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NOTES OF RECENT CASES.

Ramesam, J.
28th April, 1926.
S. A. No. 483 of 1923.

Malabar Law—Property acquired by junior member—Presumption —Junior member becoming a karnavan and executing a will —If property tarwad property.

Where one Theyyan Menon, a junior member of a *tarwad*, acquired some *kanom* property in his own name which was after his death renewed by his brother Krishna Menon in 1882 and subsequently Krishna Menon was in enjoyment of the property and he became *karnavan* in 1911, but before that, he executed a will bequeathing the property to his wife and children :

Held, there is no presumption that the property was *tarwad* property especially when it was shown that the junior member had private funds out of which he could have acquired the property. 23 L. W. 575 followed.

K. P. Ramakrishna Aiyar for Appellant.

K. Krishna Menon for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
30th April, 1926.
A. S. No. 102 of 1923.

Motor Vehicles Act—License under—Cancellation by District Magistrate—Illegal cancellation—Suit for damages against Secretary of State—If lies—Costs—Rule as to.

A suit for damages against the Secretary of State for India in Council does not lie for the cancellation by the District Magistrate of a license issued by him under the Indian Motor Vehicles Act and the rules framed thereunder for the plying of motor vehicles for hire, though such cancellation is illegal and opposed to the terms and conditions of the license. The District Magistrate did not act either as a servant or

an agent of the Government as he acted under the powers conferred upon him by Statute. 28 B. 314 and 39 M. 781 followed.

Tobin v. *Queen*, 33 L. J. Common Pleas 189 referred. 7 M. 466 (F. B.) doubted. 28 M. 213, 40 C. 452 distinguished.

Where no cause of action is disclosed against the Secretary of State for India in Council, he should not be deprived of his costs merely on the ground that the action of the District Magistrate in cancelling the license cannot be justified.

The Government Pleader for Appellant.

K. Kameswara Rao for Respondent.

T. S. V.

Spencer, J.
30th April, 1926. } C. R. P. No. 619 of 1925.

Civil Procedure Code, O. 39, R. 2—Granting of temporary injunction—Conditions imposed—Order for maintenance if can be granted.

In a suit for possession of certain properties the plaintiff applied for a temporary injunction and the Court granted the same but imposed certain conditions, one of them being, granting an order for maintenance to one of the defendants.

Held, that the words '*or otherwise*' in Rule 2 (2) of Order 39 are wide enough to include such an order and it need not be construed as *ejusdem generis* with the previous words as the order for maintenance is granted in lieu of the right of enjoyment of the property.

K. P. Ramakrishna Aiyar for Petitioner.

S. Srinivasa Aiyar for Respondent.

T. S. V.

Krishnan, J.
30th April, 1926. } C. R. P. No. 604 of 1924.

Master and servant—Wrongful dismissal—Suit for damages—Shortage of goods entrusted—When proof of negligence—Clause empowering master to dismiss for any reason—Construction.

In a suit for damages for wrongful dismissal by a store-keeper against a Co-operative Society, an unexplained shortage of the goods entrusted to the plaintiff by the Society is not by itself proof of negligence on his part unless he is shown to have been given sole and exclusive custody of the goods. A clause in the agreement of service giving the master power to remove the servant for any reason which is in his opinion sufficient, does not justify dismissal without any reason proved to the satisfaction of the Court.

S. T. Srinivasagopalachari for Petitioner.

A. Sundaram Aiyar for Respondent.

T. S. V.

Phillips and Odgers, JJ. *30th April,* 1926. } C. M. P. No. 1517 of 1926.

Civil Procedure Code, Ss. 109, 110—*Decree for more than Rs.* 10,000—*Appeal and memorandum of objections—Appeal dismissed and memorandum of objections allowed to a slight extent—Decree if one of affirmance or variation—Appeal.*

A decree passed against a defendant for a sum of more than Rs. 10,000 was appealed against by him and the plaintiff also filed a memorandum of objections. The appeal was dismissed, and the memorandum of objections allowed to the extent of a few hundred rupees, and one decree was drafted in the High Court embodying the result of the appeal and the cross-appeal. The defendant applied for leave to appeal to His Majesty in Council. *Held*, the dismissal of the appeal amounted to only an affirmation of the decree of the Court below and the incorporation in one decree of the result of allowing the memorandum of objections did not make it anything else than a decree of affirmance. 51 Cal. 969 (P. C.) ; 8 C. W. N. 294 referred to.

A.V. Viswanatha Sastri for *C. Padmanabha Aiyangar* for Petitioner.

K. V. Krishnaswami Aiyar and *T. M. Krishnaswami Aiyar* for Respondents.

T. S. V.

Devadoss, J. *3rd May,* 1926. } S. A. No. 1499 of 1923.

Arbitration—Mediator settling a dispute but one of the parties failing to act accordingly—Whether mediator liable as on a contract.

Where the defendant acted as a mediator between the plaintiff and a third person regarding a dispute about an elephant and settled that the plaintiff should get back the elephant on his paying Rs. 750 into the hands of the mediator to be paid to the 3rd defendant and both parties accepted the same but the third person failed to deliver the elephant after getting the money, *held*, the mediator cannot be held liable for the loss incurred by the plaintiff as there was no consideration for his acting as mediator and the mediator cannot be held to be a bailee either for the money or for the elephant.

K. Krishna Menon for Appellant.

K. V. Krishnaswami Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.

T. S. V.

Kumaraswami Sastri, J. *4th May,* 1926. } T. O. S. No. 11 of 1925.

Will—Undue influence—Invalidating—What amounts to.

When a will is executed by a testator while in extreme sickness, disinheriting persons who ought to form the object of his natural bounty, and bequeathing the bulk of the properties in favour of persons who

attended on him during his sickness, and when the circumstances show that the testator was kept under their undue influence and under the wrong impression that he was neglected by all others, *held*, the Court is entitled to set aside that will. 102 E.R. 410, 1 P. & D. 482, 164 E. R. 1093 followed. 11 P. D. 81 distinguished,

K. V. Ramachandra Aiyar for Plaintiff (Executor).

P. G. Krishna Aiyar for Defendant.

T. S. V.

Spencer and Ramesam, JJ.
5th May, 1926.
A. S. No. 164 of 1923.

Will—Legatee—Suit for recovery of property—Agreement by legatee to take money and sell property to defendant—Execution of sale deed contemplated—If admissible in evidence—Payment and acceptance of consideration—Part performance—Effect of.

In a suit by a legatee for recovery of specific immoveable property, the defendants relied upon an unregistered agreement by which the legatee took some money and agreed to sell the same to the defendants. The agreement contemplated the formal execution of a deed of conveyance. It also contained a clause to the effect that the legatee relinquished all her rights in the property bequeathed. *Held*, that the document which purported to be only an agreement and contemplated the execution of another document is admissible in evidence. 37 Mad. 480; 21 I. C. 777 ; 46 Mad. 373 at 380 followed.

Though the sale deed contemplated was not executed, the part performance of the agreement by payment and acceptance of the consideration is certainly a defence to the claim of the plaintiff. 46 Mad. 919 (F. B.) followed.

T. Rangachariar, K. Kameswara Rao, A. Lakshmayya for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ.
6th May, 1926.
C. M. A. No. 129 of 1925.

Civil Procedure Code, S. 11, Explanation IV—Claim in the alternative—Omission to make—When bars subsequent suit.

A suit for the recovery of a specific plot of land on the basis of possession and dispossession was dismissed on the ground that the plaintiff had no title to any specific land, he having purchased only an undivided one acre out of a large area. In a subsequent suit by him for partition and recovery of his one acre, *held*, the causes of action for the two suits being different and dissimilar, they could not be clubbed together even in the alternative in one and the same suit and hence the second suit for partition was not barred by *res judicata*. 46 Mad. 135 distd.

C. A. Seshagiri Sastri for Appellant.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Respondent.

T. S. V.

Spencer and Ramesam, JJ. *4th May*, 1926. } A. S. No. 352 of 1922.

Transfer of Property Act, S. 59—Karar—*Deposit of title deeds as security—Registration—Schedule of properties added subsequent to execution—Attestation—Absence of—Effect—Registration Act, Ss.* 21 *and* 22.

A person executed a registered *karar* under which he deposited the title deeds of his immoveable properties as security for the performance of a contract to supply timber and also recited therein that there was a charge over the same for the advance money paid. The *karar* contained a full description of the properties and was signed by the executants and two attestors. But before the document could be registered, a schedule of the properties was added at the instance of the Registration Officer and this was signed only by the executants but was not attested. In a suit filed on the basis of the registered *karar* treated as a mortgage, *held*, (1) the want of attestation after the schedule of properties did not affect the validity of the deed. 43 Mad. 405 followed; and (2) an omission to give a schedule of properties cannot affect the validity of the registration under Ss. 21 and 22 of the Registration Act provided the properties could be clearly identified or the giving of a Schedule is made compulsory by a notification of the Government.

C. V. Anantakrishna Aiyar and *K. Krishna Menon* for Appellant.

T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar* for Respondents.

T. S. V.

Krishnan and Venkatasubba Rao, JJ. *6th May*, 1926. } O. S. A. No. 19 of 1925.

Contract—Third party—Right of suit.

A person who is not a party to a contract cannot ordinarily take advantage of or enforce the contract. *Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393 followed.

On a sale of assets by a person with a direction to the vendee to pay a portion of the price to a creditor of the vendor, the creditor has no right of suit against the vendee. There is no trust created in favour of the creditor and the case does not come within any of the recognised exceptions to the general rule enunciated above.

G. Krishnaswami Aiyar and *K. Subramaniam* for Appellant.

K. S. Krishnaswami Aiyangar and *P. S. Ramaswami Aiyangar* for Respondents.

T. S. V.

Devadoss and Waller, JJ. *6th May*, 1926. } C. M. P. No. 379 of 1926.

Civil Procedure Code, S. 109—*Order of District Judge granting probate of will—Reversal by High Court—Leave to appeal to Privy Council—Grant of—Letters Patent (Madras), cl.* 39.

N R C

An appeal lies to the Privy Council against an order of a Division Bench of the High Court reversing an order of a District Judge granting probate of a will under the Probate and Administration Act. The absence of any provision in the Probate Act providing for such an appeal does not have the effect of taking away the right of appeal given by S. 109, Civil Procedure Code, and cl. 39 of the Letters Patent. o Cal. 21 distd. ; 40 Cal. 685 ; 45 Mad. 320 ; 51 I. C. 506 refd. to.

S. Varadachari and *N. S. Rangasami Aiyangar* for Petitioner.

M. Patanjali Sastri and *A. Sundaram Aiyar* for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ.
6th May, 1926.
L. P. A. No. 64 of 1925.

Contract—Non-delivery of goods—Suit for damages—Wagons not available and goods not consigned—Discharge of contract—Impossibility of performance.

According to the terms of a contract, goods were to be sent by the seller to the purchaser by rail. Owing to certain war restrictions, no railway wagons were available and hence the goods could not be despatched. In a suit for damages by the vendee for non-delivery of goods contracted to be sent by rail, *held*, it was an implied term of the contract within the knowledge of both the parties that performance was dependant on wagons being available, and if, for no fault of the vendor such wagons could not be secured, the contract became impossible of performance and was discharged, and hence the suit for damages could not be sustained. (1917) 1 K. B. 222 ; (1917) 2 K. B. 678 ; 6 A. C. 38 at 59 ; (1919) A. C. 435 at 459 ; 24 C. W. N. 703 ; 49 Mad. 200 referred to.

T.M. Krishnaswami Aiyar and *W. Kothandaramiah* for Appellant.

K.V. Krishnaswami Aiyar, Krishna Arya and *Viraraghavalu* for Respondent.

T. S. V.

Chief Justice, Ramesam and Beasley, JJ.
7th May, 1926.
A. S. No. 202 of 1923.

Contract—Advance paid—Breach of contract—Suit to recover money advanced—Interest on advance—If can be awarded.

Where money has been advanced towards a contract for the supply of goods, but the contract was not performed and a suit is filed for recovering the money advanced, *held by a majority of the Full Bench* (*Ramesam, J. contra*) the plaintiff is not entitled to claim interest on the advance, when the contract did not provide for it and no demand was made prior to suit.

Per Ramesam, J.—The law in India is different from that in England and the plaintiff is entitled to interest besides any other item of damages to which he is entitled. Case-law, English and Indian, discussed.

Per the Chief Justice.—Where the plaintiff elects only to sue for the return of the deposit by giving up his claim for damages, he cannot

recover interest on the advance. Scope of Illustration (*r*) to S. 73 of the Contract Act and Lord Tenterdon's Act on which the Indian Interest Act is based, discussed.

N. Chandrasekhara Aiyar for Appellant.

S. Varadachari and *K. V. Sesha Aiyangar* for Respondent.

T. S. V.

Kumaraswami Sastri, Offg. C. J. and Curgenven, J.
20th July, 1926.
O. S. A. No. 26 of 1925.

Partnership—New partner—Agreement inter se *to be liable for old debts—Creditor if can sue new partner—Privity of contract.*

A person became a partner of an existing firm and he agreed with the partners to be liable for all partnership debts even if they had been incurred prior to his entering the partnership. A creditor to whom moneys were owing by the firm prior to the coming in of the new partner sought to make him liable for the partnership debt. *Held*, the agreement being only between the partners *inter se*, in the absence of a separate agreement, express or implied, with him, the creditor could not make him liable. L. R. 1 P. C. 27 followed; 40 Cal. 814 referred to.

Nugent Grant and *K. S. Krishnasami Aiyangar* for Appellant.

V. Radhakrishnayya and *K. Sanjiva Kamath* for Respondent.

T. S. V.

Devadoss, J.
26th July, 1926.
S. A. No. 1434 of 1923.

Madras Estates Land Act, Ss. 53, 112, 126—*Sale of holding—Exchange of* patta *and* muchilika—*If necessary—What portion of holding to be sold.*

In order to entitle a landholder to proceed under S. 112 of the Estates Land Act and sell the ryot's holding for arrears of rent, it is not necessary that there should be an exchange of *patta* and *muchilika* for that *fasli*; it is enough if a valid *patta* continues in force during that *fasli* under S. 53 of the Act.

Though under S. 126, the extent of the holding to be brought to sale is to be as nearly as possible equal in value to the amount of arrears due, the minimum extent to be brought to sale is fixed by S. 120 to be a Revenue field which has been defined in S. 3 (12). A sale of a Revenue field though its value may be disproportionate to the amount of arrears due is not invalid.

K. S. Ramabhadra Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

T. S. V.

Devadoss, J.
26th July, 1926.
S. A. No. 1372 of 1923.

Lessor and lessee—Lease deed—Acceptance of—Evidence—Municipal registers and survey plans—Value of.

A lease deed executed by a lessee must be proved to have been accepted by the lessor and that the latter had full knowledge of its contents before it can be used in evidence against him.

Documents not *inter partes* relating to immoveable property are admissible in evidence only if they form the documents of title of one of the parties to the suit.

Municipal registers and survey plans are only a piece of evidence as to the state of things that existed at the time, but are not conclusive on the question of title or possession of the properties dealt with.

S. R. Muthusami Aiyar for Appellant.

K. V. Srinivasan for Respondent.

T. S. V.

Devadoss, J.
27th July, 1926. } S. A. No. 1574 of 1923.

Co-tenants—Ouster—Inference of—Interference in second appeal.

A Christian died leaving a son and two daughters. The son alone was enjoying the properties and alienated them as if they were his own. The daughters sued for a partition more than 20 years after they attained majority. *Held*, under the circumstances, a Court of fact is entitled to infer an ouster by the son. Where a Court of fact draws a presumption of ouster, it is not open to attack in second appeal. (1912) A. C. 230; 11 Ad. and E. 1008; 1 Cowp. 217; 43 Mad. 244 (P. C.) referred to.

The consciousness on the part of one of several co-tenants that he had no right to a share at all, coupled with an intention on the part of the other co-tenant to treat the property as his absolutely is a material circumstance from which a Court can infer ouster.

C. V. Anantakrishna Aiyar and *T. R. Subramania Aiyar* for Appellants.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondents.

T. S. V.

Jackson, J.
27th July, 1926. } C. M. S. A. No. 3 of 1925.

Civil Procedure Code, S. 47—Appeal—Order in execution—Petitioner if a representative of decree-holder.

An appeal lies against an order passed in execution holding that the petitioner is or is not the representative of the decree-holder. 25 Mad. 545 followed.

W. S. Subramania Aiyar for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V.

Jackson, J.
26th July, 1926. } C. R. P. No. 188 of 1925.

Civil Procedure Code, Ss. 148 *and* 151—*Power of Court to extend time—Suit on promissory note—Time given for succession certificate—If can be extended—Procedure.*

In a suit on a promissory note executed in favour of the plaintiff's deceased mother, the Court passed a decree but added the following : "Time for succession certificate two months, The suit shall stand dismissed in default." Before the expiry of the period of two months, the plaintiff applied under Ss. 148 and 151, Civil Procedure Code, for extension of time for filing the succession certificate and the Court treating the decree as a preliminary decree extended the time. *Held*, the decree passed was a final decree and the Court had no jurisdiction to extend time under Ss. 148 and 151, Civil Procedure Code, though it might have done so treating it as an application for review.

K. Ramamurthi and *A. Ramaswami Aiyangar* for Petitioner.

T. K. Srinivasatatachari for Respondent.

T. S. V.

Jackson, J.
28th July, 1926. } C. R. P. No. 469 of 1926.

Madras District Municipalities Act—Rules for the conduct of elections, R 4. (2)—*Scope of—Two candidates standing for election—Equality of votes—Lots if can be cast—Election petition—Judge if can take a new point* suo motu—*Procedure.*

At a meeting of a Municipal Council held for the election of Chairman, there were only two candidates and both secured an equal number of votes. Thereupon the presiding officer cast lots and declared one of them to be the elected Chairman. The defeated candidate challenged the validity of the election by means of an election petition, and during the trial of the petition the Subordinate Judge *suo motu* raised a new point, *i.e.*, that where the candidates are only two in number and there is an equality of votes, the rules did not provide for the casting of lots and on that ground set aside the election. *Held*, in revision, that it was not open to the Judge to decide the election petition on grounds which were not contained in the election petition.

Semble : A reasonable interpretation of R. 4 (2) of the Rules framed by the Government would make it applicable not only to cases where there are more than two candidates to start with, but also to a case where there are only two candidates and if there is an equality of votes, the proper procedure is to cast lots.

T. R. Ramachandra Aiyar for Petitioner.

T. M. Krishnaswami Aiyar, K. Rajah Aiyar, P. N. Appusami Aiyar and *V. Ramaswami Aiyar* for Respondents.

T. S. V.

Odgers, J.
29th July, 1926. } S. A. No. 239 of 1925.

Hindu Law—Widow—Alienation—Justifying purposes—Provision for funeral expenses of mother-in-law.

One of the items of consideration for a Hindu widow's alienation was an anticipatory provision for the funeral expenses of her mother-in-law who was alive at that time. *Held*, it was not an unreasonable use of the estate by the widow and could also be justified as tending to the spiritual welfare of her husband. 4 Pat. L J. 434 ; (1911) 1 M. W. N. 268 distd, ; (1912) M. W. N. 136 dissented from.

It is not an inflexible rule of Hindu Law that a widow cannot alienate property for future expenses. 50 M. L. J. 234 and 2 Lah. 357 refd. to.

K. S. Sankara Aiyar and *T. V. Ramamurthi* for Appellants.

B. V. Viswanatha Aiyar for Respondents.

T. S. V.

Devadoss, J.
30th July, 1926. } S. A. No. 1774 of 1923.

Madras Estates Land Act, S. 3 (5)—Estate—Minor inam—Grant of both warams of a portion of village—Whether an estate—Whether a tenant of the grantee becomes an occupancy ryot under the Act.

A post-settlement grant by a Zemindar to a temple of a portion of a village constitutes the *inam* an estate. It makes no difference that the Zemindar granted both warams, reserved no quit-rent or jodi, and put the temple in physical possession of the lands, the ryots on the lands having relinquished them to the Zemindar before the grant. The tenants of the temple in 19 9 have rights of occupancy under the Madras Estates Land Act. 45 Mad. 716 (F. B.) applied.

K. N. Rajagopala Sastri for Appellant.

B. Somayya for Respondent.

T. S. V.

Odgers, J.
2nd August, 1926. } S. A. No. 926 of 1923.

Limitation Act, Art. 144—Hindu co-parcener—Alienation by—Plea of adverse possession—Exclusion or ouster—Knowledge—Proof of—Guardian of minor—Alienation—If binds family.

An alienee from a Hindu co-parcener who claims title by adverse possession as again t the other co-parceners has to prove exclusion or ouster to their knowledge as under Art. 127 of the Limitation Act. S. A. No. 2019 of 1920 ; 25 I. C. 573 followed ; 11 L. W. 31 not followed.

A co-parcener who is in possession of the share of a Mahomedan convert is deemed to be in possession on behalf of the other members of the family.

A guardian of a minor has no power to represent the joint family of which his ward is a member and any alienation by him will not bind the other members of the family.

K. V. Krishnaswami Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 716 of 1923.

Will—Construction—Defeasance clause—Intention of testator—Indian Succession Act, S. 111.

A testator aged 67 and in feeble health executed a will in Tamil in the mofussil, under which after providing that his widow and another lady should enjoy the income of all his properties during their lifetime, he directed that his properties should thereafter be taken in equal shares by three legatees *A*, *B* and *C* with absolute powers of alienation and also that of *A* and *B* (who were father and son respectively) if either should die the survivor should take the share of the deceased. *A* survived the testator but predeceased his widow. In a suit for sale by a mortgagee from *A* of his one-third share, *B* contended that there was nothing to sell as the defeasance clause had come into operation. *Held*, the will was not governed by S. 111 of the Indian Succession Act and having regard to the intention of the testator as gathered from the various provisions of the will, the reference to death in the defeasance clause was not confined to death during the testator's lifetime and, under the circumstances that happened, the mortgagee could not succeed. Case-law discussed. 39 Bom. 296 (P. C.) applied ; (1874) L. R. 7 H. L. 388 refd. to.

The Advocate-General and *V. Krishnamachari* for Appellant.

S. T. Srinivasagopalachari for Respondent.

T. S. V.

Odgers, J.
2nd August, 1926. } S. A. No. 136 of 1926.

Arbitration—One arbitrator to select colleagues—The latter if arbitrators or assessors—Majority award—Validity of—Appeal—Review of decree pending appeal—Effect of, on appeal.

A reference to panchayatdars was addressed to one individual in the following terms : " You shall select four respectable persons whom you like and along with them you shall examine and pass a decision." He alone signed the award, but with the concurrence of two other *panchayatdars*, thus constituting a majority of the *panchayatdars*. *Held*, he did not form the sole arbitrator in the case nor were the others mere assessors, but all of them were arbitrators and as the award was not unanimous, it was invalid. 38 M. L. J. 145 and 7 Mad. 174 folld, ; 42 Bom. 668 not folld.

Where a decree was altered in proceedings taken by way of review, but pending the same the decree was appealed against, *Quaere* if the appeal could be heard, as the decree had been superseded by a new decree on review. ? 28 All. 240 ; 34 All. 282 ; 36 C. L. J. 484 considered.

V. Govindarajachari for Appellant.

A. Lakshmayya for Respondent.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 786 of 1923.

Contribution—Suit for—Decree declaring liability—If conclusive as to nature and extent of liability.

X, *Y* and *Z* were three brothers, who were members of a join family of which *X* was the manager. *Z* sued *X* and *Y* for partition o certain outstandings due to the family and a decree was passed against them for his share. In execution *Z* recovered the entire amount from *X*, who thereupon sued *Y* for contribution. *Held*, the decree obtained by *Z* is not conclusiye on the question of liability to contribute or the extent of such liability and it was open to *Y* to establish that *X* was solely liable or that both being tort.feasors the right to contribution did not exist and that the suit was not maintainable. 25 Mad. 599 folld.

A. Krishnaswami Aiyar and *B. Somayya* for Appellant.

T. V. Muthukrishna Aiyar and *R. Vaidyanathan* for Respondent.

T. S. V.

Devadoss, J.

2nd August, 1926.

S. A. No. 729 of 1923.

Customary right—Proof of—Land in possession of tenants—Acquisition of right—It binds Jenmi or melcharthdar.

The inhabitants of a village brought a suit to establish their right to bathe in a tank belonging to the 1st defendant who was a *melcharthdar* and to pass to and fro through a *paramba* belonging to him. It was in evidence that the tank was intended for irrigation purposes and had been dug by the tenants in possession, and that the villagers had been in the habit of bathing there without obstruction, whenever the water in the river near by was muddy. *Held*, (1) the evidence was not sufficient to establish a customary right as claimed by the villagers; (2) as the property had been throughout outstanding with tenants in possession, even if the villagers had acquired a customary right as against them, it would not bind the Jenmi or the *melcharthdar* claiming under him.

C. V. Anantakrishna Aiyar and *K. Kuttikrishna Menon* for Appellant.

T. R. Ramachandra Aiyar, *V. Subramania Aiyar* and *T. Krishnan Nambisam* for Respondents.

T. S. V.

Devadoss, J.
2nd August, 1926. } S. A. No. 1551 of 1923.

Lease—Agraharam—Some co-sharers alone if competent to create a lease—Estoppel—Evidence Act, S. 116.

Some only of the co-sharers of an *agraharam* leased the village sites to a stranger, who sued in ejectment a co-sharer in possession whose ancestor was a former lessee from the *agraharamdars*. *Held*, (1) in the absence of a proved custom, some of the co-sharers alone cannot grant a valid lease on behalf of all, and the lessee cannot sue in ejectment a co-sharer in possession, (2) a co-sharer in possession who is also a lessee from the *agraharamdars* is not estopped under S. 116, Evidence Act, from contending in a suit in ejectment by a subsequent lessee that the later lease is invalid by reason of the inalienability of the property.

A. Krishnaswami Aiyar and *V. Govindarajachari* for Appellants.

S. Varadachari and *M. Ramachandra Rao* for Respondents.

T. S. V.

Ramesam, J.
3rd August, 1926. } S. A. No. 822 of 1923.

Hindu Law—Partition—Suit for by junior member—Alienation by manager—Alienee—Equities in favour of—Partial partition—Plea of—Mesne profits.

In a suit for general partition by a junior member of a joint Hindu family where he had also prayed for the setting aside of a certain alienation by the manager as not being for necessary purposes, it is open to the alienee to plead that other properties not brought into the hotchpot should also be brought into hotchpot and that the alienated properties should be allotted to the share of his alienor, and thus work out the equities in his favour. The plea of partial partition is for this purpose open to strangers also.

Mesne profits in such a suit can be claimed only from the date of suit in the absence of an earlier repudiation.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellants.

K. Rajah Aiyar for Respondent.

T. S. V.

Reilly, J.
4th August, 1926. } C. R. P. No. 725 of 1925.

Partition—Suit for—Interim order for payment of money—Power to pass—Receiver not necessary.

Interim orders for payment of money for support of the plaintiff can be passed in suits for partition and it is not necessary that an application for the appointment of a receiver of the properties should have been made or be pending at the time. Such directions can be given to the parties direct without appointing a receiver.

K. Rajah Aiyar for Petitioner,

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Respondent.

T. S. V.

NRC

Reilly, J.

4th August, 1926. } S. A. No. 1668 of 1923.

Pleader—Plaintiff a minor—Putting defendant on oath—Express authorisation of next friend necessary—Special vakalqt.

In a suit on a promissory note, the question of the execution of the document having been put in issue, the pleader for the plaintiff put the defendant on oath and agreed to abide by it. The defendant took oath, whereupon the suit was dismissed. In a suit by the minor to set aside the decree, *held* (1) the pleader not having been expressly authorised by the guardian to abide by the oath of the defendant the decree was not binding on the minor; and (2) a special vakalat is not necessary to authorise the pleader to act as he did.

V. Ramadoss for Appellant.

K. Ramamurthi and *K. Kameswara Rao* for Respondents.

T. S. V.

Jackson, J.

4th August, 1926. } C. M. P. No. 1373 of 1926.

Civil Procedure Code, O. 1, R. 10—Appellate Court impleading a person not a party to the proceedings in the Lower Court—Powers of.

In a suit for specific performance by a purchaser against his vendors, impleading therein a subsequent purchaser and a mortgagee pending suit, a decree was passed in the plaintiff's favour conditional on her paying the balance of purchase money and directing the vendors and the subsequent purchaser to pay the costs; the money was accordingly deposited in Court and the mortgagee filed a petition claiming a charge over the money by way of substituted security impleading in it, the plaintiff in the prior suit and his vendors and it was dismissed. Pending appeal against that order of dismissal, the subsequent purchaser who had a subsisting decree against him for costs wanted to be made a party as a person interested.

Held, that he was neither a necessary nor a proper party to the appeal.

A. Krishnaswami Aiyar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Curgenven, J.

5th August, 1926. } S. A. No. 1667 of 1923.

Provincial Small Cause Courts Act, Sch. II, Art. 7—Enhanced rent—Suit for difference—If cognizable by Small Cause Court—Second Appeal if lies—Civil Procedure Code, S. 102—Inam registers—Entries in—Value of.

A suit to recover the difference between the rent actually payable and a smaller sum paid, on the ground that the true rent payable was more than what had actually been paid for some years is really one for

the assessment, enhancement, or apportionment of the rent of immoveable property and is not cognizable by a Small Cause Court. Even where the amount claimed is less than Rs. 500 a second appeal lies.

Evidentiary value of entries in Inam Registers pointed out.

M. S. Vaidyanatha Aiyar for Appellant.

R. Kuppusami Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

Srinivasa Aiyangar, J.
5th August, 1926. } Re B. 1 B. 1 C. Ltd. Bombay.

Indian Companies Act, Ss. 3, 164, 199 *and* 200—*Payment orders—Unpaid calls—Transfer of order to mofussil Court—Jurisdiction of High Court.*

Where the registered office of a company was situated at Bombay, and the Bombay High Court passed orders for payment of moneys due for unpaid calls against certain contributories, residing or carrying on business within certain districts in the Madras Presidency and an application was made to the Original Side of the Madras High Court, to direct the District Courts to enforce these orders, *held*, that the combined effect of Ss. 3, 199 and 200 of the Indian Companies Act is to give these orders the force of decrees passed by the Madras High Court, and the Madras High Court has jurisdiction to transfer these orders to the District Courts for execution. Sec. 164 of the Act has no application to such a case. 54 I. C. 384 not followed.

T. D. Srinivasachari and *T. Chakravarti Aiyangar* for Applicant.

T. S. V.

Devadoss, J.
6th August, 1926. } S. A. No. 1777 of 1923.

Transfer of Property (Amendment) Act (XXVII of 1926)—*If retrospective—Attestation—Acknowledgment of signature—Sufficiency of.*

The Transfer of Property (Amendment) Act (XXVII of 1926) is retrospective in operation, as it is meant only to explain the meaning of the word " attestation " as used in the Transfer of Property Act. (1898) A. C. 469 ; 769 ; (1878) 3 A. C. 582 ; 6 Ad. and Ell. 943 ; 24 Q. B. 557 referred to and principle of construction explained.

Where the attestors to a mortgage deed deposed in evidence that the document after execution was brought to them by the mortgagor and mortgagee for attestation, and they put their signatures on an acknowledgment of execution by the mortgagor, *held*, it was sufficient attestation within the meaning of the Transfer of Property Act.

P. Satyanarayana Rao for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J.
6th August, 1926.

A. S. No. 74 of 1922.

Hindu Law—Joint family—Ancestral and self-acquired properties—Throwing into the common stock—Will—Revocation—Birth of son—Effect of—Oral revocation—Proof—Presumption against intestacy.

The rule of Hindu Law is that where one among two or more co-parceners treats all the properties, ancestral and self-acquired as one, and keeps only one set of accounts, it must be taken that the self-acquisitions had been thrown into the common stock. 45 Cal. 733 ; 25 M. L. J. 57; 29 All. 244 ; 50 Cal. 439 referred to.

The will of a Hindu is not revoked by the mere fact that a son was born to him subsequently. 30 Mad. 369 followed. When a written and registered will is alleged to have been revoked orally the same must be proved by unexceptionable evidence.

When a person has died leaving a will, and a question arises whether the will includes all his properties, the presumption of law is against intestacy. *Cf.* S. 90 of the Indian Succession Act (XXXIX of 1925).

K. S. Krishnasami Aiyangar for Appellant.

A. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Respondents.

T. S. V.

Devadoss, J.
6th August, 1926.

S. A. No. 1736 of 1923.

Hindu Law—Alienation by mother of inherited property—Binding nature of—Necessity.

Where a Hindu mother inherited some property from her father and mother and she sold all that property (being the only property she had) and invested the proceeds on a mortgage security with the result that it ensured a more comfortable and beneficial living for her and her son, and the son filed a suit later for a declaration that it was not binding on him, *held*, that an alienation by the mother stood on an entirely different footing from that made by a father. The mother is not bound to sell her property to maintain herself and her son, unless there was absolute necessity and she could not otherwise preserve herself and the family.

K. Rajah Aiyar for Appellants.

K. Bhashyam, V. C. Veeraraghavan and *T. D. Srinivasachari* for Respondents.

T. S. V

Devadoss, J.
9th August, 1926. } S. A. No. 1768 of 1923.

Transfer of Property Act, S. 52—Applicability—Suit by wife for maintenance—Charge claimed on specific items of properties —Alienation pendente lite—*Validity of.*

A wife sued her husband for maintenance and claimed to have it declared a charge of certain items of properties. Pending the suit, the husband alienated one of the properties. *Held,* the principle of *lis pendens* as laid down in S. 52, Transfer of Property Act, did not apply and the alienation was valid.

K. Kameswara Rao and *K. Ramamurthi* for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V.

Ramesam, J.
9th August, 1926. } S. A. No. 1630 of 1923.

Evidence Act, S. 35—Secondary School Leaving Certificate book—Entry in relating to age of candidate—Admissibility—Relevant fact—If a public document.

A secondary school leaving certificate book in Madras is a public book, register or record within the meaning of S. 35 of the Evidence Act and an entry therein relating to the age of the candidate was a relevant piece of evidence relating to age, having been entered there in the performance of an official duty.

T. M. Krishnaswami Aiyar and *S. Narayana Aiyangar* for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V.

Curgenven, J.
10th August, 1926. } S. A. No. 130 of 1925.

Evidence Act, S. 13—Relevancy—Plaint—Statement in—Question whether property belonged to a Hindu owner—Date of death—Suit to set aside alienation.

A Hindu Widow in possession of her husband's estate sued an alience from her mother-in-law to whom properties had been allotted for maintenance for recovery of possession and obtained a decree. After her death a reversioner sued to set aside an alienation made by her and to recover possession of the property. The alienee pleaded that the property alienated did not belong to the last male holder, whereupon the reversioner put in evidence the plaint in the former suit wherein the properties had been alleged to belong to the last male holder. He also relied on a statement therein of the date of the death of the last male holder. *Held,* under S. 13 of the Evidence Act the plaint was admissible in evidence and relevant to prove that the properties belonged to the last made owner, but not for the purpose of ascertaining the date of death of the last owner. 45 Mad. 332 (F.B.) ; 33 I. C. 446 referred to

C. S. Venkatachari and *A. Venkatachalam* for Appellant.

K. Kameswara Rao for Respondent.

T. S. V.

NRC

Devadoss, J.
10th August, 1926. } S. A. No. 1807 of 1923.

Hindu Law—Partition—Division by metes and bounds—Family arrangement—Plea of ignorance of rights—If a ground to set aside.

A partition in a joint Hindu family does not require a division by metes and bounds; a definition of the shares of the members is sufficient.

A family arrangement arrived at without any concealment or mistake, with no suppression of what is true or suggestion of what is false, even if parties misunderstand the real situation is binding on all parties. Where such an arrangement has been acted upon for some time without anybody objecting to it, a plea by a party that he was ignorant of his rights will not be accepted to set it aside. 35 All. 337, 51 M. L. J. 52; 4 C. L. J. 303; 10 C. L. J. 503; 2 Ch. App. 294 referred to.

S. Varadachari and *R. Narayanaswami Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *M. S. Venkatrama Aiyar* for Respondent.

T. S. V.

Reilly, J.
11th August, 1926. } C. R. P. No. 926 of 1925.

Civil Procedure Code, Ss. 63, 73 and O. 21, R. 20—Attachment of same property in two Courts—Sale by one—Application to set aside sale—Attaching creditor in other Court—Right to apply.

The same property belonging to a person was attached by two decree-holders in two different Courts—one in the Subordinate Judge's Court and the other in the Munsiff's Court. In pursuance of the attachment in the latter Court, the properties were sold, whereupon the attaching creditor in the Subordinate Judge's Court applied under O. 21, R. 90 to have the sale set aside on the ground of fraud. *Held*, he was a person entitled to rateable distribution under Ss. 63 and 73, Civil Procedure Code, and hence could maintain an application under O. 21, R. 90. 26 M. L. J. 305 applied.

N. Chandrasekhara Aiyar for Petitioner.

P. Viswanatha Aiyar for *K. Narasimha Aiyar* for Respondent.

T. S. V.

Krishnan and Odgers, JJ.
11th August, 1926. } A. S. No. 320 of 1924.

Principal and agent—Agency—Termination of—Question of fact—Nattukottai Chettis—Practice.

The question when an agency terminated is one of fact to be determined from the fact and circumstances of each case. Among Nattukottai Chettis who send agents periodically to foreign places like Burma, Singapore, etc., neither the period fixed in the salary chit, nor the actual coming in of a new agent, nor the delivery of account books or the execution of a power-of-attorney by the old agent to such new agent to facilitate the collection of old debts is conclusive as to when

the agency actually terminated. Practice among Nattukottai Chetties adverted to. 31 M. L. J. 685 ; 687 refd. to.

A. Krishnaswami Aiyar and *V. Narayana Aiyar* for Appellant.
M. Patanjali Sastri for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *11th August*, 1926. } A. S. No. 56 of 1922.

Indian Companies Act, S. 4 (2)—"Persons"—Meaning of—Partnership formed of four firms—Individual members—Registration—Carrying on business—What amounts to.

Four separate unregistered trading firms formed themselves into a partnership for the purchase and sale of cotton. The total number of individual partners was more than twenty and in a suit for dissolution of the partnership the question was raised whether the partnership, being unregistered, was not an illegal one under S. 4 (2) of the Companies Act. *Held*, each of the four firms constituting the partnership could not be considered for the purpose of S. 4 (2) as a single person, and for the purposes of the section the individual partners of the various firms should be counted separately. As their number exceeded twenty, and it was not registered, it was not a legal partnership. 26 I. C. 613 folld.

The question whether a partnership carries on business or not is one of fact.

A. Krishnaswami Aiyar and *V. S. Narasimhachari* for Appellant.

The Advocate-General and *C. Sambasiva Rao* for Respondent.

T. S. V.

Ramesam, J. *12th August*, 1926. } S. A. No. 1504 of 1922.

Contract of sale—Breach by vendee—Vendee discharging mortgages on property sold—If entitled to subrogation.

A vendee under an agreement of sale which fell through on account of his own breach, is not entitled to subrogation in respect of moneys paid by him to discharge mortgages subsisting on the property sold, which were paid off in pursuance to the agreement. Nor can he claim the benefit of S. 64 of the Indian Contract Act. The charge that was wiped out is not a benefit that the vendor who accepted the vendee's breach is bound to restore. Case-law considered.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.
S. Varadachari and *P. V. Krishnaswami Aiyar* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *12th August*, 1926. } O. S. A. No. 120 of 1925.

Indian Arbitration Act, Ss. 12 and 13 (2)—Award remitted to arbitrator—No time fixed—Arbitrator making award more than three months later—Order of Judge refusing to extend time—If a

judgment within cl. 15 of Letters Patent—Appeal—Court—Jurisdiction to extend after award made and filed.

A Court remitted an award to the arbitrator for reconsideration, but did not fix any time for making a fresh award. An award was actually made and filed in Court more than three months after it was remitted by Court for reconsideration and an application was then made by the successful party for extending the time for making the award. The trial Judge refused to extend the time and dismissed the application. *Held*, (1) the order amounted to a judgment within the meaning of cl. 15 of the Madras Letters Patent and was appealable. 35 Mad. 1 (F. B.) ; 50 M. L. J. 361 applied ; (2) in refusing to extend the time, the Court has no power to consider the propriety or correctness of the award ; and (3) if the Court has power to extend the time, it is a fit case for doing it.

Their Lordships then referred to a Full Bench the question whether in a case where an award is remitted by Court to the arbitrator, but without fixing the time for passing a fresh award, and an award is passed and filed in Court more than three months after, the Court has jurisdiction to extend the time for making the award.

Nugent Grant instructed by *Short, Bewes & Co.* for Appellant.

P. Venkatramana Rao and *M. S. Ratnasabapathi Mudaliar* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. 12th August, 1926. — A. S. Nos. 220 and 221 of 1921.

Insolvency—Official Receiver—Right to appeal—Breach of contract by vendee—Suit for damages by vendor—Suit by vendee for return of deposit money—First suit decreed and second dismissed—Adjudication of vendee—Effect of.

A contract for the sale of goods having been broken by the vendee, the vendor sued him for damages, while the vendee sued for the return of the deposit money. The former was decreed, while the latter was dismissed. The vendee preferred appeals against both the decisions, but pending appeal he was adjudged insolvent. The Official Receiver claimed to continue both the appeals. *Held*, so far as the suit for return of the deposit amount was concerned, it related to "property" of the insolvent within the meaning of the Provincial Insolvency Act and the same having vested in the Official Receiver, he was competent to continue the appeal against the dismissal of the suit; the suit by the vendor for damages however stood on a different footing and the rights involved therein did not amount to " property " vesting in the Official Receiver and hence it was not competent for him to continue the appeal.

C. V. Anantakrishna Aiyar and *P. V. Krishnaswami Aiyar* for Appellants.

A. Krishnaswami Aiyar for Respondent.

T. S. V.

Ramesam, J.
3rd August, 1926. } S. A. No. 1610 of 1923.

Hindu Law—Joint family—Father—Reference to arbitration—Property allotted to stranger—If binding on son—Representation in suits—Decree when binding on sons.

A reference to arbitration made *bona fide* by a Hindu father under which a portion of the family properties is allotted to a stranger is binding on his son.

Whether a Hindu son is represented by his father in a suit to which the son was not co-nominee is a question of fact to be decided with reference to the facts of each case.

If the father is manager and the question in issue is one which equally affects him and the other members of the family and if the suit is properly defended the adjudication will bind all the persons interested with the father since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound if being of full age and knowing of the litigation they acquiesce in the conduct of it by his father. 29 Mad. 461 followed.

G. Lakshmanna for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V

Devadoss, J.
10th August, 1926. } S. A. No. 1760 of 1923.

Promissory note—Joint execution—Renewal by one alone—Amount realised from him after original note had become barred—Suit for contribution—If lies.

A pronote debt due by *A* and *B* jointly was renewed and a fresh pronote executed by *B* only, on the strength of which a decree was obtained by the creditor against *B* only and the entire amount realised from him only long after the original debt had become barred by limitation against *A*.

In a suit by *B* thereafter within three years from the date of payment under the decree for contribution,

Held, *B* had no cause of action to sustain a suit for contribution, *A* not having been a party to the renewal of the pronote. 39 Mad. 288, 26 Mad. 322 distinguished.

Ch. Raghava Rao for Appellant.

C. Sambasiva Rao for Respondent.

T. S. V.

Devadoss, J.
12th August, 1926. } S. A. No. 1523 of 1923.

Contract Act, S. 16—Scope of—Undue influence—Presumption when drawn—Specific allegation and proof—Instrument—Setting aside—Limitation Act, Art. 91—Finding of fact—Interference—Second Appeal.

S. 16 of the Indian Contract Act covers all cases in which from the position of the parties a presumption of undue influence can be drawn.

It is not enough in law to make a general allegation of the exercise of undue influence. Specific evidence that the transaction in question was brought about by undue influence and is hence vitiated by it must be let in. 36 Ch. D. 145 ; 10 E. R. 1192 ; 11 P. D. 82 ; 41 M. L. J. 474 referred to.

Art. 91 of the Limitation Act applies to a suit to set aside an instrument vitiated by undue influence and the cause of action for such a suit arises on the date of execution of the document. 25 Bom. 78 ; 26 Mad. 349 ; 41 M. L. J. 474 , 15 Cal. 58 (P. C.) referred to.

The High Court will interfere even with findings of fact in second appeal when they are arrived at on no evidence.

T. V. Venkatrama Aiyar for Appellant.

S. Subramania Aiyar for Respondent.

T. S. V.

Devadoss, J.
12th August, 1926. — S. A. No. 1826 of 1923.

Malabar Compensation for Tenants' Improvements Act, S. 6 (2)—Redemption—Decree for rent obtained—Right of set off—If allowed.

In a redemption suit in Malabar, where a decree for arrears of rent has already been passed during the pendency of the mortgage, but the execution of such decree is not barred at the time of passing the redemption decree, the Court has power under S. 6 (2) of the Malabar Compensation for Tenants' Improvements Act to allow a set off with respect to the decree amount as against the value of improvements found payable under S. 6 (1) of the Act.

K. P. Krishna Menon for Appellant.

A. K. Balakrishnan for Respondent.

T. S. V.

The Offg. Chief Justice, Krishnan, Ramesam, Venkatasubba Rao and Curgenven, JJ.
13th August, 1926. — L. P. A. No. 125 of 1924.

Insolvency—Hindu father—Sale by Official Receiver prior to vesting order—Subsequent order—Effect of—Sale—Validity—Official Receiver—If agent of Court—Ratification—T. P. Act, S. 43.

Where on a Hindu father becoming insolvent, the Official Receiver sells some family properties prior to the vesting of the estate in him and a vesting order is passed subsequently, *held* by a majority of the Full Bench (Krishnan, J. dissenting) the principle of S. 43 of the Transfer of Property Act applies and the sale is valid.

The Official Receiver is not the agent of the Court when he acts in such matters and no question of ratification can arise.

Case-law discussed.

The Hon'ble Mr. V. Ramadoss and *V. Krishna Mohan* for Appellant.

S. Varadachari and *N. Rama Rao* for Respondent.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *13th August*, 1926. — A. S. Nos. 120, 262, etc. of 1922.

Hindu Law—Partition—Sisters—Survivorship—Document in writing registered—Alienation—Surviving sister—Right to impeach.

A partition between Hindu sisters of properties inherited from their father, destroying their mutual rights of survivorship can be made without a document in writing, registered. 34 Mad. 72 folld. Where such a partition was made and alienations conferring absolute rights had followed thereon by each of the sisters, it is not open to the surviving sister on the death of the other to sue for the recovery of the share of the deceased.

The Advocate-General, B. Sitarama Rao, S. R. Muthuswami Aiyar and *Watrap S. Subramania Aiyar* for Appellants.

A. Krishnaswami Aiyar and *K. Rajah Aiyar* for Respondents.

T. S. V.

The Offg. Chief Justice and Curgenven, J. *13th August*, 1926. — A. S. No. 422 of 1922.

Hindu Law—Applicability—Jains—Adoption—Consent of sapindas—If necessary.

In the absence of a custom or local usage, Jains are governed by the Hindu Law and an adoption by a Jain widow in the Madras Presidency without the authorisation of her husband or the consent of his *sapindas* is not valid. Case-law discussed.

Per Kumaraswami Sastri, O. C. J.—If the matter were *res integra*, a Court should hold that Jains are not Hindus do not follow Hindu scriptures and hence the rules as to consent of *sapindas* for making an adoption should not be applied to them. History of Jainism traced and its difference from Hinduism pointed out.

C. Sambasiva Rao for Appellant.

P. Venkatramana Rao and *V. S. Narasimhachari* for Respondents.

T. S. V.

Curgenven, J. *13th August*, 1926. — S. A. No. 1249 of 1923.

Transfer of Property (Amendment) Act (XXVII of 1926)—Attestation—Meaning of—Act if retrospective.

Act XXVII of 1926 which explains the meaning of the word "attestation" in the Transfer of Property Act is retrospective in effect. Decision of Devadoss, J. in S. A. No. 197 of 1923 folld.

K. S. Jayarama Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar* for Respondent.

T. S. V.

Jackson, J.
13th August, 1926. } C. M. S. A. No. 27 of 1925.

Limitation Act, S. 20—Agent—Payment by—Court paying out moneys—If agent of decree-holder.

X obtained a decree against the sons of *Y* on a promissory note executed by *Y* and pending the suit obtained attachment before judgment of a fund deposited in another Court by a debtor of *Y* in execution proceedings. The decree of *X* was transferred to that Court for execution and the sum attached was paid over to him. For the balance of the decree amount, *X* took out application for execution and relied on the fact of payment by Court of the attached amount as saving limitation under S. 20 of the Limitation Act. *Held*, the Court could not be considered the agent of the judgment-debtor within the meaning of S. 20 as the element of volition was lacking and a fresh period of limitation could not be computed therefrom. 41 M. L. J. 423 and 11 H. L. 115 referred to.

K. Subba Rao for *V. Ramadoss* for Appellant.

A. Venkatachelam for Respondent.

T. S. V.

Curgenven, J.
13th August, 1926. } S. A. No. 57 of 1924.

Hindu Law—Adoption—Will—Directions in—Properties given to widow—Sale of properties by decree-holder against adopted son—Suit to recover.

A testator by his will authorized his widow to adopt and made certain dispositions in her favour to be enjoyed for her life. She made an adoption and incurred a promissory-note debt as guardian of the adopted son, for a necessary purpose. In execution of the decree on the promissory note, the properties given to the widow were attached and sold, as though the adoption related back to the death of the testator and the properties belonged to the adopted son. The widow sued to recover the properties. *Held*, (1) the adoption did not relate back to the date of death of the testator. 43 Bom. 778 (P. C.) distd. ; (2) as the direction regarding adoption was conditional on the adoptee observing the directions relating to the disposition in favour of the widow, the adopted son could not approbate and reprobate at the same time. 46 Mad. 300 ; 21 Mad. 10 followed.

P. Somasundaram for Appellant.

K. Venkatrama Raju for Respondent.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1751 of 1923.

Hindu Law—Adoption—Widow—Assent of sapindas*—Reversioner withholding consent—Existence of other reversioners not proved—Adoption if valid.*

The mere fact that the only *sapindas* who are proved to have been in existence withheld their assent when a Hindu widow applied to them

for their consent will not enable her to make an adoption, even if the withholding of assent has been improper. In Southern India, before a Hindu widow can make an adoption, some *sapinda* must have given his assent.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant.

C. Sambasiva Rao for Respondent.

T. S. V.

Jackson, J.
16th August, 1926. } Cr. Rev. Case No. 516 of 1925.

Criminal Procedure Code, S. 403—*Plea of* autre fois acquit—*Charge under S.* 420, *Indian Penal Code—Former trial ending in acquittal—Second trial for the same offence under a different description.*

The accused sold some properties to the complainant and induced the latter to pay Rs. 3,000 agreeing to deposit Rs. 1,350 in Court to raise an attachment then subsisting. He also represented there were no other encumbrances. He did not deposit the amount in Court and it subsequently transpired there was another encumbrance on the properties for Rs. 5,000. The complainant charged the accused with having cheated him by taking the amount and failing to pay Rs. 1,350 into Court. The case ended in an acquittal. He subsequently filed another complaint for cheating by taking away Rs. 3,000 on a false representation that there were no other encumbrances on the property. *Held*, the second trial was illegal by reason of S. 403, Criminal Procedure Code. 28 All. 312 referred to.

V. L. Ethiraj and *K. G. Srinivasa Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1842 of 1923.

Limitation Act, Ss. 6, 7 *and Art.* 125—*Alienation by Hindu limited owner—Suit to set aside—Plaintiff a minor at the date of alienation—Suit within three years of majority but more than* 12 *years after alienation—Existence of other reversioners who could have sued—Effect.*

A suit was filed by a Hindu reversioner to set aside an alienation made by a Hindu limited owner more than 12 years after the alienation, but within three years of the plaintiff attaining majority. The plaintiff was a minor at the time of the alienation, but the facts showed there were other reversioners of the same degree who could have sued to set aside the alienation. *Held*, there was only a single cause of action to sue for the whole body of reversioners and the other reversioners not having exercised their right within the period fixed by Art. 125 of the Limitation Act, the suit was barred, and the plaintiff could not get the benefit of Ss. 6 and 7 of the Act. 41 Mad. 659 applied; 48 All. 152 (P.C.) distinguished.

B. Sitarama Rao and *A. Swaminatha Aiyar* for Appellant.

T. M. Ramaswami Aiyar, E. Krishna Aiyar and *K. V. Sesha Aiyangar* for Respondents.

T. S. V.

Devadoss, J.
16th August, 1926. } S. A. No. 1821 of 1923.

Hindu Law—Gift—Construction—Estate taken—Gift to unborn children—Person having only a spes successionis—*Attestation—Effect of—" Heirs "—If includes class.*

S and *R* made a gift of a small portion of their family property to *M* in the following terms : " As we have given the said lands to you from our family property as *stridhanam*, you shall yourself cultivate the said lands, pay the Circar cist, etc., due on the lands and enjoy them. If you have male issue, such male issue alone shall take the property after your life-time. You shall not encumber the lands by way of mortgage, etc. . . . If you have no male issue, then our heirs shall take the aforesaid lands." The lands were subsequently sold to the defendants and other lands purchased, and the sale deed was attested by *R*. *M* died without issue in 1918 and the sons of *R* sued for their share of the property gifted to *M*, *Held* (1) *M* took only a life-interest in the property ; (2) the gift in favour of the unborn children of *M* was valid under Madras Act I of 1914 ; (3) *R*. having only a *spes successions* during the life-time of *M*, his attestation will not estop him or his heirs ; and (4) the word "heirs" did not indicate a "class of persons" and the English decisions on the subject were not applicable.

A. V. Viswanatha Sastri for Appellants.

T. V. Ramanatha Aiyar for Respondents.

T. S. V.

Reilly, J.
18th August, 1926. } C. R. P. No. 656 of 1924.

Indian Contract Act, S. 45—Partnership—Dissolution of—Suit on a pro-note—Some alone suing—Other partners joined after lapse of period of limitation—Effect.

In a suit to recover a debt due to a partnership, even after dissolution of the partnership all partners must join. If the suit is instituted by some alone within time, and the other partners are joined after the period of limitation has expired, the whole suit is barred under S. 22 of the Limitation Act.

T. A. Ananta Aiyar for Petitioner.

S. Sankara Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
19th August, 1926. } S. A. No. 1261 of 1923.

Inam—Swastivachakam *service—Alienation of—Validity—Alienation in favour of member of family—Effect.*

A sale of *Swastivachakam* service *inam* lands is void and the fact that it is in favour of a member of the inamdar's family who is actually performing the services for which the *inam* was granted does not affect the question of its validity. 45 Mad. 620 ; 1 L. W. 827 ; 6 Mad. 76 ; 15 Mad. 183 ; 38 Mad. 650 followed.

T. V. Subba Rao for Appellants.

K. N. Rajagopala Sastri for Respondent.

T. S. V.

Jackson, J.
12th August, 1926. } Cr. Rev. Case No. 64 of 1926.

Criminal Procedure Code, S. 147—Preliminary order—Omission to state likelihood of breach of peace—Effect of.

A preliminary order under S. 147 of the Criminal Procedure Code is not bad because it failed to state that in the opinion of the Magistrate there is a likelihood of the breach of the peace. 27 M. L. J. 587 followed.

K. Kameswara Rao for Petitioner.

The Public Prosecutor (J. C. Adam) for the Crown.

T. S. V.

Curgenven, J.
13th August, 1926. } S. A. No. 30 of 1924.

Deed—Construction—Will or conveyance—Suit against X—Death of X—Heir impleaded—Property bequeathed to legatee proceeded against—Legatee if bound.

Where a document described as a "conveyance deed" provided that after the death of the donor the properties should be enjoyed by the *donee* with absolute rights and that the donor should not during his lifetime execute any deeds with respect to the said property, *held*, on a construction of the document, that it was not a will but a conveyance which came into operation immediately and not after the death of the donor. 46 M. L. J. 288, 33 Mad. 304; 8 Cal. W. N. 614 considered.

In a suit to recover money due from *X*, *X* died during the pendency of the suit having bequeathed a portion of his property in favour of *Y*. As the legal representative of *X* his heir alone was brought on record in the suit but not the legatee and a decree was obtained. In execution of the decree the properties bequeathed to the legatee were attached.

Held, the decree was not binding on the legatee as he was a necessary party to the suit. 14 Cal. W. N. 1041; 26 Cal. 103; 32 Cal. 315 applied.

K. Ramamurthi and *K. Kameswara Rao* for Appellant.

P. Venkataramana Rao for Respondent.

T. S. V.

Jackson, J.
19th August, 1926. } C. R. P. Nos. 576 and 577 of 1926.

Civil Procedure Code, O. 39, R. 2—Temporary injunction—Balance of convenience—Proof of prima facie *title—Injunction in terms mandatory—Power to grant.*

Mere balance of convenience is not the only consideration to be taken into account in deciding whether a temporary injunction should or should not be issued. Proof of *prima facie* title is equally essential. An order granting injunction solely upon a consideration of convenience is without jurisdiction.

N R C

A Court cannot, under O. 39, R. 2, Civil Procedure Code, grant a temporary injunction in terms mandatory. It is, however, competent to issue a temporary injunction which is prohibitory in form even though in effect it may be mandatory. 38 Bom. 381 ; 41 Mad. 208 ; 41 C. 436 and 16 Bom. L. R. 566 considered.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Petitioners.

V. Govindarajachariar for Respondent.

T. S. V.

Odgers and Madhavan Nair, JJ.
20th August, 1926.

Cr. Rev. Cases Nos. 377 to 404 of 1926.

Madras District Municipalities Act, Ss. 249, 250 and Sch. V, cl. (q)—Setting up rice-hulling machine—Construction of—Permission obtained—Working of mill—Process likely to be dangerous to human life or health or property—Annual license from Chairman—If necessary.

The accused obtained the permission of the Madura Municipality for installing a rice-hulling machine under S. 250 of Madras Act V of 1920, and began hulling rice without obtaining a license from the Chairman under S. 249. They were prosecuted under S. 338 of the Act, and the Magistrate found as a fact that the business carried on was an industrial process "likely to be dangerous to human life or health or property" within Sch. V, cl. (q). *Held*, taking out the permit to construct a factory or instal machinery under S. 250 did not absolve the accused from the necessity to take out annual licenses under S. 249. Scope of the two sections explained. Cr. Rev. Case No. 503 of 1925 : 50 M. L. J. 384 dissented from ; 45 M. L. J. 731 applied ; 45 M. L. J. 555 referred to.

The Public Prosecutor for Petitioner.

S. T. Srinivasagopalachari for Accused.

F. S. Vas for the complainant Municipality.

T. S. V.

Devadoss, J.
20th August, 1926.

S.A. Nos. 1788 and 1789 of 1923.

Landlord and tenant—Forfeiture—Mulgeni lease—Clause prohibiting alienation in favour of "any other person"—Co-lessees—Alienation by one lessee in favour of co-lessee—Alienation in favour of heir—If works out forfeiture—English Law—Applicability.

A *mulgeni* lease granted in favour of three persons, members of one and the same family, contained a clause prohibiting alienation in favour of "any other person". One of the lessees made an alienation in favour of a co-lessee, while there was another alienation to a daughter of one of the co-lessees. The landlord sued in ejectment, claiming forfeiture on the ground of the two alienations. *Held*, the alienation in favour of a co-lessee would not work forfeiture as it did not amount to an alienation to "any other person" within the meaning of the forfeiture clause ; but (2) the alienation to the daughter, though it was to an heir on whom

the lease would devolve on the death of her father, worked a forfeiture and the landlord was entitled to sue in ejectment. Case-law discussed.

B. Sitarama Rao and *K. Y. Adiga* for Appellant.

S. T. Srinivasagopalachari and *K. P. Sarvothama Rao* for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
20th August, 1926.
S. A. No. 1411 of 1923.

Malabar Compensation for Tenants' Improvements Act, S. 19—Lease of lands prior to 1886—Improvements to be paid for at customary rate–Renewal after 1886—Rates fixed lower than under the Act—Rate of compensation—Law applicable.

A *kushikanom* deed of the year 1871 provided for payment of compensation at the customary rate; this was renewed in 1883 and the document fixed a certain rate for payment of compensation, which was less than the rate payable under the Malabar Compensation for Tenants' Improvements Act, and the same rate was incorporated in a later renewal of 1895. In a suit for ejecting the lessee the question arose as to the rate at which compensation was to be paid for improvements. *Held*, (1) as the deed of 1871 did not specify any rate, but only provided for payment of the customary rate, all improvements made between 1871 and 1883 should be paid for at the rate fixed under the Act. 33 Mad. 218 folld.; and(2) improvements effected between 1883 and 1895 should be paid for at the rate fixed in the *kushikanom* deed of 1883, even though the rate contained therein is less than the rates due under the Act. S.A. No. 1645 of 1922 and 40 Mad. 594 folld.

K. Kuttikrishna Menon for Appellant.

O. A. Krishna Variar for Respondent.

T.S. V.

Curgenven, J.
27th August, 1926.
S. A. No. 1705 of 1923.

Madras Estates Land Act, S. 12—Trees—Right—Contract in writing—Nature of.

In a suit for a declaration that the trees belonged to the Zemindar, he relied on a *muchilika* executed by the tenants in which they stated that they had no right to the trees on the holding during a particular year. *Held*, "the contract in writing" referred to in S. 12 of the Estates Land Act must be a contract subsisting during the period in dispute. L. P. A. No. 33 of 1925 relied on. Scope of S. 12 adverted to.

C. V. Anantakrishna Aiyar for Appellant.

B. Jagannadha Doss for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926. } S. A. No. 72 of 1924.

Mahomedan Law—Minor—Alienation of share by mother—Invalidity of—Subsequent setting aside of partition—Alienee—Equities in favour of.

A Mahomedan mother acting as the *de facto* guardian of her minor son made an alienation of a certain property belonging to her husband's estate. The son after attaining majority sued for partition treating the alienation as not binding, the alienee being also a party to the suit. *Held*, in allotting the shares, the Court should, if possible, allot the alienated property to the share of the mother, so that the equities in favour of the alienee might be worked out.

K. S. Jayarama Aiyar for Appellant.

C. A. Seshagiri Sastri for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926. } S. A. No. 52 of 1924.

Hindu Law—Widow—Alienation by—Presumptive reversioner relinquishing rights—Effect on after-born sons—Reversioner if claims through another.

A presumptive reversioner executed a deed of relinquishment of rights in favour of a vendee from a Hindu widow after taking some properties and some cash from the alienee. The deed was executed by him on his own behalf and as guardian of his minor son, and by another son who was a major at that time. Subsequently a third son was born. The presumptive reversioner predeceased the widow and his three sons happened to be the actual reversioners. In a suit instituted by them to set aside the alienation the Courts below held that all of them were estopped from questioning the alienation as their father had ratified the transaction after taking some benefit which the plaintiffs have inherited.

Held, (1) the 1st plaintiff, who joined the deed of relinquishment, was estopped he being a major at that time and though he was not even a presumptive reversioner; (2) that the 2nd plaintiff, being a minor at the time of the relinquishment deed, it was not competent for the father to barter away his rights which was only a *spes successionis*. 46 Cal. 566 followed; (3) that second and third plaintiffs were not estopped as they did not claim through their father. 24 Cal. 94; 42 Mad. 523 followed, and the fact that the plaintiffs 2 and 3 retained the benefit obtained by their father did not matter. 30 C. L. J. 56 followed.

K. Kameswara Rao for Appellant.

P. Somasundaram for Respondent.

T. S. V.

Ramesam and Reilly, JJ.
27th August, 1926. } A. S. No. 15 of 1926.

Civil Procedure Code, S. 80—Scope of—Suit against Official Receiver—Injunction restraining sale—Notice if necessary—"Act"—Meaning of.

Where a suit was brought against an Official Receiver for a declaration that the properties in the suit which had been advertised for sale by the Official Receiver as belonging to the insolvent were the properties of the plaintiff and for an injunction restraining him from holding the sale, *held*, no notice as contemplated by S. 80, C. P. Code, is necessary and the suit filed without giving such notice is good.

The word " act " in the phrase " act purporting to be done by him " in S. 80 means and includes only a completed act or an act begun but not completed and cannot include a threatened act, to be begun and completed in the future. 36 Cal. 28 ; 32 Bom. 243 ; 48 Bom. 87, folld.; 39 M. L. J. 151, considered.

Per *Ramesam, J.*—The suit in such cases is laid only in respect of the threatened future act of sale and cannot be regarded as laid in respect of the past acts such as advertisement of sale, etc.

Per *Reilly, J.*—S. 80 being a restrictive section should be strictly construed, and should not be applied to suits such as for injunction where irremediable damage would occur by insisting on the statutory notice.

C. S. Venkatachari for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
27th August, 1926. } A. S. No. 99 of 1923.

Mortgage—Redemption—Usufructuary mortgage—Term fixed—Extension of—Mortgagee unable to get possession due to fault of mortgagor—Effect of.

The term fixed in a usufructuary mortgage cannot be extended even though for a portion of that period the mortgagee was unable to get possession on account of the fault of the mortgagor. 25 Mad. 587 and S. A. No. 219 of 1896, folld.

An *othi* was created for a period of 10 years from the expiry of a first mortgage on the suit property. Subsequently a third mortgage was created and the third mortgagee redeemed the first mortgage on the expiry of his term. Two years later the *othidar* sued for redemption and got possession from the third mortgagee a year later. When the period of 10 years expired, the third mortgagee sued to redeem the *othidar* and the Court below held the latter was entitled to remain in possession for the period he was kept out and that the suit was premature. *Held*, the period fixed could not be extended and the suit filed at the expiry of 10 years was not premature.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

S. Muthiah Mudaliar and *A. C. Sampath Aiyangar* for Respondent.

T. S. V.

N R C

The Chief Justice, Krishnan and Curgenven, JJ. }
1st September, 1926. } A. S. No. 61 of 1924.

Civil Procedure Code, S.13, Exception (b)—Foreign judgment—Default of appearance—Judgment if one given on the merits—Suit on.

A foreign judgment obtained on default of appearance is not given on the merits of the case and is not conclusive as to any of the matters adjudicated therein. 40 Mad. 112 (P. C.) and 45 Mad. 496 (P. C.) referred to.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Appellant.

K. V. Krishnaswami Aiyar and *N. Kunchitapadam Aiyar* for Respondents.

T. S. V.

Devadoss, J. }
1st September, 1926. } S. A. Nos. 1723 and 1724 of 1923.

Practice—Second Appeal—Point expressly not pressed by pleader in Trial Court—Plea one relating to jurisdiction—If can be raised newly—Madras Estates Land Act, S. 3 (2) (d)—Estate.

An issue which involves an investigation of facts and which the pleader in the Trial Court says he does not press will not be permitted to be taken in second appeal, even though the plea raised thereby may relate to the jurisdiction of the Court to entertain the suit.

Where a *Dharmasasanam* village in a permanently settled Zamindari is admitted to consist of *Kudi* and *Pannai* lands and the *melvaram* and the *kudivaram* in the *Kudi* lands are admitted to belong to the plaintiff and defendant, respectively, the Court is not wrong in presuming that the village is an estate within S. 3, cl. 2 (*d*) of the Madras Estates Land Act.

P. R. Srinivasan for Appellants.

A. Sundaram Aiyar for Respondents.

T. S. V.

Devadoss and Wallace, JJ. }
2nd September, 1926. } S. A. No. 1520 of 1923.

Transfer of Property Act, S. 53—Sale in fraud of creditors—Test of—Intention—Part of consideration found to be actually paid—Vendee if entitled to charge.

Where a sale is liable to be set aside under S. 53 of the Transfer of Property Act as one in fraud of creditors, but it is found that a portion of the consideration fixed was actually paid and went to discharge some simple money debts of the vendor, the vendee is not entitled as a matter of right to a charge in respect of the consideration actually found paid. 10 Mad. 6 ; 24 M. L. J. 266 ; 7 C. L. J. 586 ; 43 Bom. 759, folld. ; 19 L. W. 135, dissented from ; 33 Mad. 334; 36 Mad. 29, distd.; 43 Cal. 831 (P. C.) and 44 Cal. 662 (P. C.), considered.

Essentials of a suit under S. 53 discussed.

T. R. Ramachandra Aiyar and *V. Subramania Aiyar* for Appellant.

N. Chandrasekhara Aiyar for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926. } S. A. Nos. 433 to 438 of 1924.

Madras Estates Land Act, S.3 (4)—Cocoanut garden—Digging shallow pits or wells at a cost of a few annas—If an improvement—Test of—Cocoanut tree—If a fruit tree.

In the case of a cocoanut garden, sinking wells or shallow pits at the expense of a few annas cannot be said to be an improvement within the meaning of S. 3 (4) of the Estates Land Act. The real test in such cases is to see if the holding has risen in value by reason of the alleged improvement.

Cocoanut trees are not fruit trees within the meaning of S. 3 (4) (*f*) of the Act.

M. Patanjali Sastri and *C. Rama Rao Saheb* for Appellants.

B. Sitarama Rao and *V. Ramaswami Aiyar* for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926. } S. A. No. 1191 of 1924.

Limitation Act, Art. 12 (a)—Decree against Hindu father—Sale of joint family property in execution—Suit by son challenging—Cause of action—Limitation—Period of.

Where in execution of a decree obtained against a Hindu father alone, the decree-holder sells in Court auction an item of joint family property the remedy of the sons is to challenge the sale by proving that the decree debt was for an illegal or immoral purpose. The sale is not void, but only voidable, and the period of limitation applicable to such a suit is one year under Art. 12 of the Limitation Act. Case-law discussed.

Watrap S. Subramania Aiyar for Appellant.

T. M. Krishnaswami Aiyar, M. Krishna Bharati and *C. S. Swaminathan* for Respondents.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926. } S. A. No. 1142 of 1923.

Mahomedan Law—De facto *trusteeship—Conception if known to—Suit for rent by* de facto mutawalli—*If lies.*

The conception of a *de facto* trustee is not foreign to Mahomedan Law and it is competent to the *de facto mutawalli* of a mosque to sue tenants for arrears of *melwaram* due. Tyabji Mahomedan Law, p. 627; 37 All. 90; 63 I. C. 171 and 38 Mad. 262, referred to.

N. Chandrasekhara Aiyar and *V. N. Shama Rao* for Appellant.

K. Rajah Aiyar and *S. Rajagopalachari* for Respondent.

T. S. V.

Devadoss, J.
2nd September, 1926. } S. A. No. 1839 of 1923.

Limitation Act, Art. 47—Applicability—Possession proceedings under S. 145, Criminal Procedure Code—Order in favour of a party—Suit by him to recover possession—Limitation.

Where proceedings under S. 145, Cr. P. Code, take place and the Magistrate passes an order in favour of one of the parties, a suit by him to recover possession is not governed by Art. 47 of the Limitation Act. Even though at the time of passing the order, possession is with the defendant, the effect of an order under S.145, Cr.P. Code, upholding the right of the plaintiff is to treat such possession as on behalf of the successful party and he has the ordinary period of 12 years for suing to recover possession. Scope of Art. 47 explained ; and the alteration in the language of S. 145 adverted to.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Appellant.

A. Venkatrayaliah and *L. Venkatanarasiah* for Respondents.

T. S. V.

Devadoss, J.
2nd September, 1926. } S. A. No. 1887 of 1923.

The Madras District Municipalities Act (V of 1920), Ss. 85 and 367—Arrears of house tax accrued due under old Act—Suit for recovery of—Suit after new Act came into force—Charge if can be claimed—Substantive right.

In respect of arrears of house tax which had accrued due prior to the coming into force of the Madras District Municipalities Act (V of 1920), a Municipality filed a suit for the recovery thereof after the new Act came into force and claimed a charge on the house by virtue of Ss. 85 and 367. *Held*, S. 367 dealt only with the mode of recovery and made the procedure under the new Act applicable in respect of suits filed after it had come into force, but the substantive rights of the parties were not affected by the coming into force of the new Act. S. 367 had not the effect of making S. 85 retrospective

G. Lakshmanna for Appellant.

B. Jagannath Das for Respondent.

T. S. V.

Odgers, J.
13th August, 1926. } S. A. No. 1639 of 1923.

Adverse possession—Mortgagor and mortgagee—Deposit of money by mortgagor under S.83, *Transfer of Property Act—Suit to redeem—Decree directing mortgagee to draw out money and deliver possession—Effect of.*

Where a mortgagor deposited the mortgage amount into Court under S. 83, Transfer of Property Act, and subsequently filed a suit for redemption and obtained a decree directing the mortgagee to withdraw the amount in Court deposit in full satisfaction of the mortgage claim and re-deliver the property to the mortgagor, *held*, the relationship of mortgagor and mortgagee ceased with the decree and thereafter the possession of the mortgagee was adverse to the mortgagor. 14 C. W. N. 1001 ; 7 L. W. 269 referred to.

V. C. Veeraraghavachari for *K. Bhashyam Aiyangar* for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

Curgenven, J.
27th August, 1926. } S. A. No. 1692 of 1923.

Civil Procedure Code, S. 11*—Vendor and vendee—Prior suit in Munsif's Court for possession—Subsequent suit in sub-Court for refund of consideration—*Res judicata*—Civil Procedure Code, O.* 2, *R.* 2*—Bar of suit—Limitation Act, Art.* 116*—Time when begins to run.*

The plaintiff purchased in 1909 certain properties from the husband of the defendant. As he was unable to get possession, he sued his vendor and another who claimed title in the Munsif's Court for possession. The suit was decreed in the Trial Court, but dismissed on appeal. In 1919 the plaintiff sued in the Court of the Subordinate Judge for recovering the consideration amount paid for the sale. The defendant contended that the sale was nominal, and without consideration and was barred under O. 2, R. 2 and was not within time. *Held* (1) the finding of the munsiff in the prior suit that the sale was supported by consideration, if it had not been appealed against, was conclusive between the parties and operated as *res judicata* in the present suit ; (2) though the present suit had been filed in the Court of the Subordinate Judge by adding certain other items, such as the costs of the prior suit, for the purpose of seeing if the finding in the prior case operated as *res judicata*, the Court could split up the claims and see if the claim as regards the consideration amount was not cognisable by the munsiff who tried the prior suit ; (3) the suit was not barred by O. 2, R. 2 ; (4) the period of limitation is six years under Art. 116 of the Limitation Act, and began to run from the date of the sale and not the date of the judgment in appeal in the former suit which negatived the claim of the plaintiff. Case-law discussed.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Appellant.

W. S. Subramania Aiyar for Respondent.

T. S. V.

N R C

Jackson, J.
2nd September, 1926. } Cr. Rev. Case No. 146 of 1926.

Penal Code, S. 225-B—Escape from arrest—Warrant giving wrong description of accused—If illegal.

Where an arrest warrant described the accused as plaintiff instead of as defendant, but there was no mistake about the name or identity of the accused who was convicted for an offence under S. 225-B, Indian Penal Code, *held*, the wrong description of accused will not make the warrant illegal unless the accused has been prejudiced. 51 C. 902 ; 5 C.W.N. 413 referred to.

K. P. Ramakrishna Aiyar for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Wallace, JJ.
2nd September, 1926. } S. A. Nos. 433 to 438 of 1924.

Madras Estates Land Act, Section 3 (4) (a) and (f)—Improvement—Raising of cocoanuts by digging pits or springs on river-beds.

Pits or springs dug on river-beds for purposes of irrigation, though generally called wells, cannot be considered to be improvements within the meaning of S. 3 (4) (*a*) of the Madras Estates Land Act.

Cocoanuts cannot be called fruits and the raising of cocoanuts does not amount to planting of fruit trees within Section 3 (4) (*f*) of the Act.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for Appellant.

B. Sitarama Rao and *V. Ramaswami Aiyar* for Respondent.

N. S.

Odgers, J.
3rd September, 1926. } S. A. No. 122 of 1924.

Malabar Law—Thiyyas of Calicut—If entitled to compulsory partition-Hindu Law—If applies.

His Lordship referred to a Bench the question whether the Thiyyas of Calicut were entitled to compulsory partition, and whether they are governed by Hindu Law in all respects. 17 M. 184 ; 39 M. L. J. 427 referred to.

K. P. Ramakrishna Aiyar for Appellant.

M. C. Sridharan for Respondent.

T. S. V.

Srinivasa Aiyngar, J.
7th September, 1926. } O. P. No. 185 of 1926.

Succession Act (XXXIX of 1925), S. 301—Non-taking of probate—Right of legatee to apply for removal of executor.

Under S. 301 of the Indian Succession Act, a legatee can put in a petition for the removal of an executor although no probate has been taken.

M. S. Venkatarama Aiyar with *S. Jagadisa Aiyar* for Petitioner.

J. A. Pinto and *V. C. Gopalaratnam* for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
9th September, 1926.
C. M. A. No. 107 of 1925.

Civil Procedure Code, S. 151 *and* O. 41, *R.* 23—*Remand under inherent power—Power of Court—Order not appealable.*

An Appellate Court has power to remand a suit to the trial Court under its inherent powers in cases not covered by O. 41, R. 23. In such a case the order is not appealable. 44 Cal 929 ; 3 Pat. L. J. 253 ; 45 Mad. 449, 900 ; 48 Mad. 713 referred to.

B. Somayya for Appellant.

M. Patanjali Sastri for Respondent.

T. S. V.

Krishnan, J.
9th September, 1926.
C. R. P. No. 865 of 1925.

*Civil Procedure Code, Ss.*73, 151, *O.*21, *Rr.*72, 82, 90—*Purchase in Court auction by decree-holder—Amount set off for decree—Application by another decree-holder for rateable distribution—If entertainable—Application by decree-holder to set aside sale—Power of Court.*

A decree-holder purchased the attached property in auction and had his decree amount set off against the purchase amount. Subsequently another decree-holder whose execution petition was pending applied for rateable distribution under S. 73. Then the first decree-holder applied to have his sale set aside as he was unaware of the pendency of the second execution petition.

Held, the sale could not be set aside as O. 21, Rr. 89, 90 will not apply and the second decree-holder was entitled to rateable distribution from the first. 20 C. 8 ; 59 I. C. 86 followed.

K. Sankara Sastri for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

The Chief Justice,
9th September. 1926.
S. A. No. 71 of 1924.

Transfer of Property Act, Ss. 122 *and* 123—*Document by which properties are dedicated to an idol, whether requires registration.*

The question whether a document by which certain properties are dedicated to an idol must be registered was referred to a Full Bench. *See* 13 M. L. J. 364.

C. Rama Row for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

The Chief Justice,
10th September, 1926.
S. A. No. 202 of 1924.

Civil Procedure Code, O. 34, *R.* 6—*Decree directing the defendant to pay the decree amount and in default directing the hypothecated property to be sold—Application for personal decree whether necessary.*

Where a decree in a suit upon a mortgage directed "that the defendants do pay" the decree amount to the plaintiff and then provided for the sale of the hypothecated properties, the decree is a personal decree and no application for another personal decree is necessary under O. 34, R. 6. It is only where the decree is in conformity with Form No. 4 of Appendix D of the Civil Procedure Code, that an application under O. 34, R. 6 would be necessary. The construction of the decree is a pure question of law and can be taken in second appeal though not raised in the Courts below. 38 M. 677 referred to.

B. Jagannadha Doss for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Reilly, J.
13th September, 1926. } C. R. P. No. 248 of 1925.

Provincial Insolvency Act (V of 1920), *Ss.* 28 (2) *and* 34 (2)—*Transfer of Property Act, S.* 65—*Mortgagee paying arrears of revenue due upon the mortgaged property after the adjudication of the mortgagor as insolvent—Suit for recovery of the amount paid from the mortgagor and the Official Receiver—Maintainability.*

The mortgagee paid arrears of revenue accrued due upon the mortgaged property after the mortgagor was adjudicated as insolvent. He brought a suit for recovery of this amount which he had paid from the mortgagor and the Official Receiver. The Lower Court held that the suit was not maintainable and the mortgagee must prove his claim in the insolvency.

Held, that the suit was maintainable as the arrears of revenue paid accrued after the date of the order of adjudication.

V. Suryanarayana for Appellant.

P. V. Rangaram for Respondent.

N. S.

Jackson, J.
13th September, 1926. } C. R. P. No. 238 of 1926.

Civil Procedure Code, S. 115 *and O. VI, R.* 17—*Amendment of plaint—Amendment when a fresh suit for that relief would have been barred—Interference in revision.*

In a suit for rent based upon a lease the defendant pleaded that as the lease-deed was not registered the claim must fail. After the statement was filed and before the trial commenced, the plaintiff applied for amendment of plaint by the addition of a prayer for the relief of damages for use and occupation. Such a suit would, on that date, have been barred. The District Munsif allowed the amendment.

Held, (1) the amendment ought not to have been allowed inasmuch as the effect of it was to deprive the defendant of the right accrued to him by virtue of the bar of limitation. 36 M. 378 distinguished and 33 Bom. 644 referred to; (2) that it was a fit case for interference in revision. 14 M. L. T. 588 distinguished.

S. Narayana Aiyangar for Petitioner.

A. S. Visvanatha Aiyar for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
14th September, 1926.

C. M. S. A. No. 142 of 1924.

Limitation Act, Art. 182 (5)—*Application by decree-holder auction purchaser for possession of properties under O.* 21, *R.* 95, *Civil Procedure Code, whether step-in-aid of execution—Pendency of execution petition whether necessary—Limitation Act, Art.* 138 —*Applicability when the decree-holder is himself the auction purchaser.*

An application by the decree-holder auction purchaser for possession of properties under O. 21, R. 95, Civil Procedure Code, can be a step-in-aid of execution within Art. 182 (5) of the Limitation Act. 24 M. 185 followed. 6 M. H. C. R. 304 distinguished. For such an application to be a step-in-aid of execution it is not necessary that the execution petition must be pending when the application is filed. Observations of Ayling, J. in 45 M. 466 dissented from. Article 138 of the Limitation Act does not contemplate suits by decree-holder auction purchasers; it only contemplates suits by stranger auction purchasers.

D. A. Krishna Wariar for Appellant.

T. S. Viswanatha Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
15th September, 1926.

C. M. A. No. 29 of 1925.

Civil Procedure Code, Ss. 11 *and* 47 *and O.* 21, *R.* 66—*Suit on mortgage—Prior mortgagee impleaded as defendant—His rights not put in issue—Decree—Execution application by defendant mortgagee under O.* 21, *R.* 66 *to show his mortgage as an encumbrance in the sale proclamation—Appeal*—Res judicata.

In a suit upon a mortgage the prior mortgagee was impleaded as the 4th defendant and he raised the prior mortgage in his favour. But no issue was framed as regards his rights. A mortgage decree was passed in the suit in favour of the plaintiff without declaring the rights of the prior mortgagee defendant. By this time the 4th defendant purchased the property in execution of his decree upon his mortgage. When the property was sought to be brought to sale in execution of the decree upon the mortgage, the 4th defendant applied to the Court under O. 21, R. 66, Civil Procedure Code, to stop the sale on the ground that he had become the owner or to amend the sale proclamation by stating that the property was subject to his mortgage decree. The Lower Court dismissed the application on the ground that his rights were not recognised by the decree. The 4th defendant appealed.

Held (1) that no appeal lay and the remedy of the 4th defendant was to file a suit; (2) that a fresh suit by the 4th defendant would not be barred by *res judicata.*

K. P. M. Menon and *B. Pocker* for Appellant.

S. Ranganatha Aiyar and *A. V. K. Krishna Menon* for Respondent.

N. S.

N R C

Odgers and Madhavan Nair, JJ. *16th September,* 1926. } S. A. No. 1755 of 1922.

Land Acquisition Act, S. 6 (1)—" *Wholly or partly out of public revenues* "—*Payment of a trivial sum of one anna.*

The condition in the proviso to S. 6 (1) of the Land Acquisition Act that a compensation to be awarded for the property declared to be needed for a public purpose is to be paid, wholly or partly, out of public revenues, is satisfied by payment of a particle. It need not necessarily mean a substantial part. A payment of one anna by Government is not an evasion of these provisions of the section. 51 M. L. J. 338 dissented from. 3 A. C. 483 and 18 Cal. 99 distinguished.

K. Ramanatha Shenai for Appellant.

The Government Pleader for Respondent.

N. S.

Odgers, J. *17th September,* 1926. } S. A. No. 183 of 1924.

Civil Procedure Code, O. 21, *R.* 2 (3)—*Uncertified adjustment of decree—Transfer of Property Act,* S. 53—*Burden of proof—Portion of the consideration utilised in discharge of a prior binding debt—Right of alienee to a charge for that portion.*

Under O. 21, R. 2, cl. 3, Civil Procedure Code, an uncertified adjustment of decree out of Court cannot be pleaded as a defence to an execution application. 38 Mad. 538 and 43 Mad. 760 referred to.

Where a transfer is vitiated as to part of the consideration by S. 53 of the Transfer of Property Act, the onus is on the transferee to prove that the transaction was entered into *bona fide* and for valuable consideration. 33 Mad. 334 followed. Where a transfer is set aside as being in fraud of creditors, it is not in all cases that the transferee is entitled to a charge to the extent it is made for real consideration. It will depend on the circumstances of each case. Where the transferee is *participis criminis* he is not entitled to a charge even though he might have discharged prior encumbrances. 30 Mad. 6 followed. 36 Mad. 29 and 19 L. W. 135 referred to.

T. R. Ramachandra Aiyar and *K. Venkateswara Aiyar* for Appellant.

C. S. Venkatachariar and *S. Sankara Aiyar* for Respondent.

N. S.

Odgers, J. *17th September,* 1926. } S. A. No. 845 of 1923.

Contract—Sale of goods—Purchaser committing breach of contract—Suit for recovery of advance.

A purchaser of goods who has himself committed a breach of contract cannot bring a suit for recovery of money paid to the vendor as advance at the time of the contract. 4 M. and G. 898 and 19 All. 489 followed.

C. V. Anantakrishna Aiyar for Appellant.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ. *17th September*, 1926. } L. P. A. No. 81 of 1925.

Letters Patent, cl. 15—" *Judgment* "—*Order of a Judge hearing a second appeal that a new issue should be framed and calling for a finding.*

An order by a Judge hearing a second appeal by which a new issue is raised and a finding thereon called for from the Lower Court is not a " Judgment " within the meaning of clause 15 of the Letters Patent and is consequently not appealable.

T. V. Venkatarama Aiyar for Appellant.

B. Satyanarayana for Respondent.

N. S.

The Chief Justice and Curgenven, J. *19th September*, 1926. } O. S. A. No. 79 of 1925.

Civil Procedure Code, S. 146, *O.* 21, *R.* 16 *and O.* 22, *R.* 10—*Death of applicant pending execution petition—Legal representative whether can be brought on record—Procedure to be followed.*

Where pending an execution application, the applicant dies, there is no procedure for bringing on record the legal representative of the deceased in that application. The proper procedure is only to file an independent execution application under O. 21, R. 16. O. 22, R. 10 of the Civil Procedure Code does not apply as it relates only to " other cases of assignment, creation or devolution of interest " other than those contemplated in the preceding sections. Section 146 of the Code does not also apply.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Respondent.

N. S.

Jackson, J. *21st September*, 1926, } C. R. P. No. 789 of 1923.

Civil Procedure Code, S. 152—*Suit for money claim—Compromise for a certain amount providing for the amount being charged on certain properties—Decree not providing for the charge in terms of the compromise—Decree passed under the old Code of Civil Procedure—Amendment of decree by the insertion of the clause for charge—Whether can be granted.*

In a suit for money claim, the parties put in a compromise petition that a certain amount should be paid to the plaintiff and the same be charged upon certain immovable properties of the defendant. The Court passed a decree in terms of the compromise but the decree did not

provide for the charge. The decree was passed while the old C. P. Code of 1882 was in force. The plaintiff put in a petition for amendment of the decree by the insertion of the clause as to the charge.

Held (1) that under the old C. P. Code of 1882 it was doubtful whether in a suit for money claim a decree could be passed creating a charge upon immovable properties, though such a decree can be passed under the new C.P. Code of 1908, and consequently (2) the decree cannot be amended. 18 M. 410 ; 22 M. 214 ; 33 M. 102 ; 49 M. L. J. 490 ref.

N. Viswanatha Aiyar and *V. Chellamiah* for Petitioner.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. M. S. A. No. 45 of 1924.

Practice—Execution petition—Petition for amendment by inclusion of other properties for attachment after the expiry of 12 years from the date of the decree—Whether can be allowed.

An execution petition was put in for attachment and sale of certain properties just before the expiry of twelve years from the daté of the decree. Subsequently, after the expiry of 12 years from the date of the decree, a petition was put in for amendment of the execution petition by the inclusion of certain other properties for attachment and sale. The amendment was allowed by the Lower Court.

Held, that the order of the Lower Court must be set aside as no question of amendment arose in such a case, there being no defect in the original application. 27 M. L. J. 25 and 19 Q. B. D. 394 followed. 26 M. L. J. 83 referred to 45 M. L. J. 651 distinguished.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Appellant.

N. Viswanatha Aiyar for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. R. P. No. 343 of 1925.

Contract—Stranger to the contract—Right of suit on the contract—Surety paying off creditor—Rights of—Contract Act, S. 140.

A simple-creditor whose debt has been directed to be paid out of the consideration amount retained by the vendee from the debtor is entitled to sue the vendee for recovery of the amount. 38 M. 753 referred to. 43 M. L. J. 129, 41 C. 137 and 47 M. L. J. 517 followed. A surety who has paid off the credit of the debtor is entitled, on such payment, to stand in the shoes of the creditor and enforce all the remedies of the creditor as against the debtor and persons claiming under him. 21 W. R. 347 followed. *Drew* v. *Lockett*, 55 E. R. 196 referred to.

D. Ramaswami Aiyangar for Petitioner.

N. K. Mohanarangam Pillai for Respondent.

N. S.

Krishnan, J.
9th September, 1926. } C. R. P. Nos. 387 and 388 of 1925.

Madras Village Courts Act, S. 73—Misconduct—Allegation that notice of suit was not served and records were fabricated.

Allegations by a judgment-debtor in a decree of a village court who applies to the District Munsiff under S. 73 of the Village Courts Act that he was not served with notice of the suit and the records were fabricated amount to " misconduct " within S. 73 of the Act.

K. Bhashyam Aiyangar and *K. V. Srinivasa Aiyar* for Petitioner.

T. L. Venkatrama Aiyar for Respondent.

N. S.

Odgers, J.
14th September, 1926. } C. M. P. No. 2809 of 1926.

Civil Procedure Code, O. 41, R. 10—Dismissal of appeal for failure to furnish security for costs—Application to set aside the order of dismissal—Maintainability.

No application lies for setting aside an order rejecting an appeal for failure to furnish security for costs and restoring it to file. 19 M. L. J. 304 and C. M. P. No. 174 of 1925 followed.

C. Rama Rao and *P. V. Rangaram* for Petitioner.

K. Kameswara Rao for Respondent.

N. S.

Odgers, J.
15th September, 1926. } S. A. No. 185 of 1924.

Malabar Law—Property standing in the name of a junior member — Presumption — Karar — Strisothu *— Management by females.*

When property stands in the name of a junior member of a Malabar tarwad there is no presumption that the property is tarwad property when it is not shown that it was acquired out of tarwad funds. 23 L. W. 575 ; 39 M. L. J. 590 followed.

Quaere : Whether there can be a *Strisothu* tavazhi managed by females ?

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Devadoss, J.
21st September, 1926. } S. A. No. 1268 of 1924.

Civil Procedure Code, O. 41, R. 27 (2)—Additional evidence recorded with consent of parties—Recording of reasons by the Court—Necessity of.

The Appellate Court which allows additional evidence to be let in for the first time in the appeal must record its reasons for the same, even though the parties consent to the additional evidence being allowed to be let in.

N R C

Watrap S. Subramania Aiyar, K. Rajah Aiyar, V. Ramaswami Aiyar and *K. R. Rama Aiyar* for Appellant.

C. V. Anantakrishna Aiyar and *A. S. Viswanatha Aiyar* for Respondent.

N. S.

Jackson, J.
21st September, 1926. } C. R. P. Nos. 726 to 728 of 1925.

Decree—Execution—Amount paid into Court towards the decree—Attachment of, by another decree-holder—Validity—Payment of one decree-holder's claim whether a fraud on the other decree-holders.

Where the judgment-debtor pays the full decree amount into Court towards satisfaction of the decree, the amount cannot be attached by another decree-holder of the same judgment-debtor and the executing Court is bound to enter up satisfaction of the decree. The fact that one decree-holder alone is paid by the judgment-debtor will not constitute a fraud on the other decree-holders.

T. S. Anantaraman for Petitioners.

C. Unikanda Menon for Respondents.

N. S.

Devadoss and Sundaram Chetty, JJ.
22nd September, 1926. } C. M. A. No. 317 of 1924.

Insolvency—Adjudication of two persons as insolvents—Joint debtors—Same act of insolvency, whether necessary.

A petition to adjudicate two persons as insolvents is maintainable if they are joint debtors. It is not necessary that they must have committed the same act of insolvency. Williams on Bankruptcy, 13th Edition, page 186 referred to. The test is whether, treated as a suit, the petition would be bad for multifariousness.

In a case where the respondents, besides owing the same debt to the petitioner, were also partners, a petition to adjudicate them both as insolvents is maintainable. 44 M. 810 referred to.

B. Satyanarayana for Appellant.

B. Somayya for Respondent.

N. S.

Devadoss and Sundaram Chetty, JJ.
23rd September, 1926. } C. M. A. Nos. 307 of 1924 and 91 of 1925.

Provincial Insolvency Act (V of 1920), Ss. 53 and 28 (7)—Transfer more than two years before the order of adjudication but within two years before the date of presentation of the petition for adjudication.

A transfer by an insolvent effected within two years of the date of presentation of the petition for adjudication can be set aside under S. 53, even though it is more than two years before the date of the order of adjudication. 35 M. L. J. 296 followed. 49 Bom. 730 and

72 I. C. 433 dissented from. (1904) 1 K. B. 451 at 455, 46 C. 991, 42 A. 433, 42 C. 289 referred to.

K. Krishnaswami Aiyangar and *S. Ranganatha Aiyar* for Appellants.

B. Somayya for Respondents.

N. S.

Odgers and Curgenven, JJ.
24th September, 1926.

L. P. A. No. 124 of 1924.

Pleader—Engagement by client for several cases—Suit by client against pleader's legal representatives for accounts—General agency—Limitation—Limitation Act, Art. 89.

A client engaged a pleader for several rent suits. He sued the pleader's legal representatives, after the pleader's death, for an account of moneys advanced to the pleader in connection with the rent suits.

Held (1) that there is no such thing as general agency between a pleader and his client. The contract of agency for each suit becomes complete on the execution of the vakalat for that suit and is terminated when that suit is ended. 14 Ch. D. 406 followed. Consequently the suit was barred in respect of the rent suits disposed of more than three years prior to the date of the suit ; (2) that the death of the pleader did not give a fresh cause of action against his legal representatives so as to give a fresh starting point of limitation. 17 C. W. N. 5 and 25 All. 55 dissented from. 16 M. L. T. 614 followed. 23 M. 292 and 27 M. 243 referred to.

P. Chenchiah for *P. Venkatramana Rao* for Appellant.

S. Varadachariar and *V. Suryanarayana* for Respondent.

N. S.

Devadoss, J.
27th September, 1926.

S. A. No. 1501 of 1923.

Civil Procedure Code, S. 35*—Costs—Successful defendant when can be deprived of costs—False evidence adduced on his side—Interference with order of costs in Second Appeal.*

Where a suit is wholly dismissed, the successful party should not be deprived of his costs on the ground that some of his witnesses gave false evidence, when the case cannot be said to have been unnecessarily protracted by the false evidence. Such an order of the Lower Court, though affirmed on appeal, must be set aside in second appeal as being contrary to principle.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant.

P. Satyanarayana for *A. Satyanarayana* for Respondent.

N. S.

Ramesam and Reilly, JJ.
27th September, 1926.

A. S. No. 129 of 1923.

Mortgage—Suit on—Impleading of party setting up paramount title—Suit bad for multifariousness—Person properly impleaded raising a paramount title.

A person who sets up a paramount title in himself should not be impleaded as a party to a suit on a mortgage. If he is impleaded as a party, the suit is bad for multifariousness. 12 C. 414, 33 C. 425 and 38 A. 488 followed. 31 A. 11, 40 A. 584 and 30 C. L. J. 301 referred to.

Per *Ramesam, J.* (*Reilly, J.* contra).—If a person who is properly impleaded as a party to a mortgage suit raises a paramount title in himself, such a question must be decided in the suit. 15 C. W. N. 66 followed. 4 Rang. 214 not followed. 11 C. W. N. 284, 36 A. 567, 23 L. W. 664 referred to.

C. V. Anantakrishna Aiyar and *C. Unikanda Menon* for Appellant.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Respondent.

N. S.

Odgers and Curgenven, JJ.
27th September, 1926. } C. M. A. No. 320 of 1925.

Civil Procedure Code, S. 151 and O. 41, R. 23—Remand under inherent power of Court and not under O. 41, R. 23—Appeal—Revision.

No appeal lies from an order of remand made under the inherent power of Court and which does not fall under O. 41, R. 23 of the Civil Procedure Code. 37 M. L. J. 536 and 48 M. 713 followed.

No revision lies from such an order. 16 L. W. 515 followed. (1926) M. W. N. 48 explained and distinguished.

P. Kameswara Rao, Ch. Raghava Rao and *A. Sundaram Aiyar* for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Reilly, J.
28th September, 1926. } C. R. P. No. 189 of 1925.

Practice—Sub-Judge invested with Small Cause powers—Trial of suit of Small Cause value as original suit—Parties not raising objection—Appeal to District court—Maintainability.

The Subordinate Judge of Cochin tried a suit upon a pronote for Rs. 240 as an original suit and the parties did not take any objection to it. An appeal was filed to the District Judge against the decree dismissing the suit and it was allowed by the District Judge.

Held, on revision, that the notification of the High Court of Madras, dated 13th February, 1917, conferring upon all the Subordinate Judges in the Madras Presidency small cause powers in suits up to the value of Rs. 500 did not exempt Cochin Sub-Court and consequently no appeal lay to the District Judge and the order of the District Judge must be set aside. 33 M. 323 (F. B.) followed.

P. Govinda Menon for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Reilly, J.
28th September, 1926. } S. A. No. 494 of 1924.

Religious endowment—Idol—Suit on behalf of by a person not a manager or a trustee—Maintainability.

Where it is not suggested or proved that there was a trustee or manager acting for a temple, a suit on behalf of the idol to restrain the defendant from interfering with the temple wall instituted by the *Archaka* who was in charge of the temple keys and who was otherwise a fit and proper person, is maintainable. 52 C. 809 (P. C.) applied.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Appellant

B. Jagannadha Doss for Respondent.

N. S.

Jackson, J.
29th September, 1926. } S. A. No. 284 of 1924

Malabar Compensation for Tenants' Improvement Act (I of 1900), *S.* 5—*Several defendants in a suit for redemption—Duty of Court to decide the amount of compensation due to each defendant.*

In a suit for redemption the Court must fix the amount of compensation due to each defendant separately. It is not enough if the total amount due to all the defendants is fixed and the defendants directed to settle among themselves the amounts due to each of them. The settlement of the claims is a condition precedent to the passing of a decree for redemption. 41 M. 960 distinguished.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
29th September, 1926. } C. M. A. No. 9 of 1926.

Civil Procedure Code, O. 39, *R.* 1—*Letters of administration in respect of properties situate in a foreign country granted by the foreign Court—Power of British Court to restrain person resident in British India from acting upon the Letters of administration.*

A British Court has got jurisdiction to restrain, by injunction, a person residing within its jurisdiction from acting upon letters of administration granted to him by a foreign Court in respect of properties movable and immovable situated in a foreign country.

V. Narayanan, T. M. Krishnaswami Aiyar and *K. S. Venkatrama Aiyar* for Appellant.

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
29th September, 1926.
C. M. S. A. No. 94 of 1924 and C. R. P. No. 803 of 1924.

Civil Procedure Code, O. 21, R. 91—Decree holder attaching third person's property by mistake and purchasing it himself—Mistake found out by decree-holder only after confirmation of sale—Sale whether void or must be set aside.

A decree-holder attached properties belonging not to the judgment-debtor but to a stranger by mistake and purchased it himself. He found out the mistake only after the sale was confirmed. Without putting in an application to set it aside under O. 21, R 91, Civil Procedure Code, he put in a petition to attach the properties of the judgment-debtor alleging that the previous attachment and sale were null and void and need not be set aside.

Held, that the attachment and sale were not null and void and must be set aside under O. 21, R. 91, Civil Procedure Code, within the period of limitation provided therefor and the same not having been done the decree cannot be executed again. Observations in 41 C. 590 (P. C.) were explained as being *obiter*.

8 M. 99, 30 M. 209 and 2 Pat. 829 referred to.

The fact that the decree-holder himself was the purchaser was held not to make any difference.

P. N. Marthandam Pillai and *N. Rama Aiyar* for Appellant.

R Krishnaswami Aiyangar for Respondent.

N. S.

Sundaram Chetty, J.
29th September, 1926.
S. A. No. 529 of 1924.

Limitation Act, Art. 149—Adverse possession against Government—Erection of thatched shed on Natham Poramboke and enjoyment.

Where a person erected a thatched shed on Natham Poramboke land, enclosed the site with a fence and enjoyed it as of right for a continuous period of over 60 years, *held*, that he acquired a title to the site by adverse possession. 16 Bom. 338, 21 M. 53 and 46 M. 866 referred to. 44 M. 883 (P. C.) discussed

The Government Pleader instructed by *C. V. Harihara Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

N. S.

Devadoss, J.
30th September, 1926.
S. A. No. 245 of 1924.

Madras Irrigation Cess Act (VII of 1865), S. 1 (a)—"River, stream, channel, tank or work belonging to Government"—Water from springs on Government land.

Water which springs up from underground on Government land cannot be said to be supplied from " any river, stream, channel, tank or work belonging to Government " within the meaning S. 1 (*a*) of Act VII of 1865. Where water arising from springs on Government

land was carried by a channel which was found by both the Lower Courts to have been dug by the ancestors of the ryotwari tenant and enjoyed by them for over 60 years and used for irrigation purposes, *held*, that the Government was not entitled to levy water tax.

The Government Pleader with *C. V. Harihara Aiyar* for Appellant.

V. S. Narasimhachar for Respondent.

N. S.

The Chief Justice, Jackson and Sundaram Chetty, JJ.
30th September, 1926.

C. R. P. No. 742 of 1926.

Civil Procedure Code, S. 115—Court—Chief Judge of the Small Causes Court acting under Rule 4 of the Rules framed under the Madras City Municipal Act—Whether persona designata—*Jurisdiction of Commissioner to go into the question of disqualification of election candidates.*

The Chief Judge of the Court of Small Causes acting under Rule 4 of the Rules framed by the Governor in Council under the Madras City Municipal Act of 1919 is *persona designata* and not a selected member of the Court chosen to represent it and consequently the High Court has no jurisdiction to entertain a revision petition against his order. 3 Ran. 560 followed. 47 Mad. 369 distinguished.

Quaere : Whether the Commissioner is invested by the Madras City Municipal Act of 1919 with the powers of enquiring into grounds of disqualification which do not appear on the face of the nomination paper of a candidate for election or whether he is only to decide objections arising out of the nomination paper itself, *i. e.*, whether the Act confines him to the purely ministerial functions. 13 A. C. 241 and (1904) 1 K. B. 74 referred to.

K. S. Krishnaswami Aiyangar and *K.S. Rajagopala Aiyangar* for Petitioner.

Vere Mockett, M. Damodaram Naidu and *S. Rangaswami Aiyangar* for Respondent.

N. S.

Devadoss, J.
1st October, 1926.

S. A. No. 255 of 1924.

Hindu Law—Joint family—Alienation by a co-parcener—Suit by the other co-parcener to recover possession of property alienated from the alienee—Right of alienee to have the property in his possession allotted to the share of the alienor.

A Hindu co-parcener in a joint family consisting of two persons alienated certain items of the joint family properties and gave possession of them to the alienee. Subsequently, all other items of the family properties were alienated by both the co-parceners to discharge joint family debts. The co-parcener who did not join in the first alienation brought a suit against that alienee to recover possession of the properties alienated by the other co-parcener. It was found by the Lower Courts that the share of the alienor would be worth much more than the value of the property alienated.

Held (1) that the alienee was entitled to the share of his alienor as on the date of the alienation and *not* as on the date of the suit. 35 M. 47 followed; (2) that the alienee was entitled to retain the property alienated, as on the date of the alienation, the alienor's share in the family properties would have been more than the value of the property alienated. 46 M. 815 followed.

T. M. Ramaswami Aiyar for Appellant.

V. Ramaswami Aiyar for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
1st October, 1926.
C. R. P. No. 653 of 1924.

Madras Hereditary Village Officers Act (III of 1895), S. 13 (1), proviso 2 and S. 21—Suit for emoluments of an office by the office-holder—Jurisdiction of Civil Court.

All suits for emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the Revenue Court. The Civil Court has jurisdiction only in one case, viz., where one of the issues is whether the emoluments are land or an assignment of revenue, and even that issue has first to be decided by the Revenue Court. 30 M. 126 and 30 M. 320 followed.

V. Thyagaraja Aiyar for Petitioner.

C. Narasimhachari and *M. E. Rajagopalachariar* for Respondent.

N. S.

Odgers and Curgenven, JJ.
1st October, 1926.
C. M. A. No. 331 of 1925.

Civil Procedure Code, O. 41, R. 23—Preliminary point—Suit for separate maintenance by a Hindu wife against her husband—Wife when entitled to separate maintenance.

In a suit by a Hindu wife against her husband for separate maintenance the Court framed the following issues, viz.: (1) Is the plaintiff entitled to maintenance and, if so, to what amount? (2) Is the plaintiff entitled to any allowance for raiment? (3) On what properties should the maintenance be charged? The Trial Court dismissed the suit on the ground that the plaintiff was not entitled to claim maintenance, without recording a finding on the other issues. On appeal, the District Judge held that the plaintiff was entitled to maintenance, reversed the Trial Court's decree and remanded the suit for trial on the other issues. On appeal to the High Court from this order of remand, *held* (1) that an appeal lay as the decision of the Trial Court was on a preliminary point and the same was reversed by the District Court. 45 M. 900 followed. 12 L. W. 667 considered.

A Hindu wife is not entitled to separate maintenance on the ground of abandonment by her husband unless that abandonment implies a refusal to maintain her. Where a Hindu wife left her husband's house under circumstances which did not justify her so leaving the house and for considerable time there was no offer on the part of the wife to go and live with her husband, *held*, that she was not entitled to separate maintenance. 31 M. 338 followed.

A. Ramachandra Aiyar for Appellant.

S. Jagadisa Aiyar for Respondent.

N. S.

Devadoss, J.
20th September, 1926.
S. A. No. 1874 of 1923.

Principal and agent—Sale of goods—Merchant consigning goods to commission agent to another place—Relationship between.

The legal relation between a merchant in one country and a commission agent in another is that of a principal and agent, and not that of a seller and buyer, though this is consistent with the agent and principal—when the agent consigns the goods to the principal—being in a relation like that of seller and buyer for some purposes. (1872) Law Reports, 5 H. L. 395, (1883) 11 Q. B. 797 referred to. 47 M. L. J. 312, 41 Mad. 1060 referred.

A. Krishnaswami Aiyar, Ch. Raghava Rao and *B. T. M. Raghavacharyulu* for Appellants.

V. Suryanarayana for Respondents.

N. S.

Devadoss and Sundaram Chetty, JJ.
20th September, 1926.
C. M. A. No. 314 of 1924.

Provincial Insolvency Act (V of 1920), S. 53—Application to set aside alienation of insolvent—Dismissal of—Right of individual creditor to appeal.

Where in an application by the Official Receiver to set aside an alienation of the insolvent under S. 53 of the Provincial Insolvency Act the Court refused to set it aside, an individual creditor has no right to come for the first time on appeal to the High Court, unless he first offers to indemnify the Official Receiver for the costs of prosecuting the appeal, and the Official Receiver declines to appeal in his own name. 47 Mad. 673 followed.

P. Somasundaram and *V. Krishna Mohan* for Creditor-appellant.

T. Ramachandra Rao for Official Receiver.

Ch. Raghava Rao, A. Sundaram Aiyar and *B. T. M. Raghavacharyulu* for Respondent-purchaser.

N. S.

Krishnan, J.
26th September, 1926.
C. R. P. No. 47 of 1925.

Civil Procedure Code, Sch. II, paras. 20 and 21—Procedure under—Formal order filing the award before pronouncing judgment in terms of it—Omission to pass—Material irregularity—Revision.

Where an application is made to have an award filed under para. 20 of Sch. II, Civil Procedure Code, the Court after being satisfied under para. 21 should, in the first instance, order that the award be filed, and then only it can proceed to pronounce judgment in terms of the award. The order that the award be filed is appealable whereas the judgment in terms of the award is not; and the action of the Court in passing judgment and decree without a formal order for filing the award is a material irregularity justifying revision as it deprives the parties of the valuable right of appeal.

N R C

P. V. Vallabhacharyulu for Petitioner.

Ch. Raghava Rao and *B. T. M. Raghavacharyulu* for Respondents.

N. S.

Jackson, J.
27th September, 1926. } C. R. P. No. 349 of 1925.

Madras Abkari Act (I of 1886), Ss. 12 and 13—Licence to sell toddy—Licensee a benamidar on behalf of four persons in partnership—Legality of the partnership—Pronote executed by one of the partners for monies advanced by the other partners—Validity of—Contract Act, S. 23.

Where a licence to sell toddy was obtained in the name of a benamidar on behalf of four persons in partnership, and a pronote was executed by one of the partners for monies advanced in the business by other partners, *held*, as the licence merely forbids sale, transfer or sub-lease and appointment of an agent, without the permission of the Collector, there is nothing either in the Abkari Act or in the terms of the licence to make a partnership on whose behalf at the inception the licence has been obtained, illegal *per se.*

Held also that the suit pronote does not come within the mischief of S. 23 of Indian Contract Act. 54 I. C. 45, 43 M. 141 distinguished.

Ch. Raghava Rao for Petitioner.

B. T. M. Raghavacharyulu for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
30th September, 1926. } C. M. A. No. 261 of 1924.

*Civil Procedure Code, S. 11—Prior suit by mortgagee on his mortgage against Official Receiver as representing the mortgagor—Decree—Subsequent application by the Official Receiver under S. 53 of the Provincial Insolvency Act to set aside the mortgage—*Res judicata.

A suit was instituted on a mortgage and as the mortgagor had been adjudicated an insolvent the Official Receiver was impleaded as the defendant. A decree was passed in the suit. Subsequently the Official Receiver applied under S. 53 of the Provincial Insolvency Act of 1920 to set aside the mortgage. *Held*, that the prior decision in the mortgage suit was not *res judicata* in the subsequent application. 48 M. 750 followed.

V. Suryanarayana for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Odgers and Curgenven, JJ.
1st October, 1926. } C. M. A. No. 314 of 1924 and C. M. P. No. 3287 of 1926.

Provincial Insolvency Act (V of 1920), S. 75 (c) and Sch. I—Order annulling voluntary transfer—Whether includes order

refusing to annul it—Leave to appeal—Application for—Court to which it should be made—Procedure.

In Schedule I of the Provincial Insolvency Act an order annulling the voluntary transfer does not include an order refusing to annul it. So an Official Receiver has first to obtain leave to appeal under S. 75 (*c*) of the Provincial Insolvency Act. Though leave can be granted by both the District Court and High Court, yet as a matter of practice application for leave to appeal has in the first instance to be filed in the District Court.

Where an appeal is filed without obtaining leave either from the District Court, or from the High Court and an application is made for the first time at the time of arguments, *held*, that the proper course in such a case is to direct the application to be made before the District Court alone. 33 I. C. 773 followed.

P. Somasundaram and *V. Krishna Mohan* for Appellant.

Ch. Raghava Rao, A. Sundaram Aiyar and *B. T. M. Raghavacharyulu* for Respondent.

T. Ramachandra Rao for the Official Receiver.

N. S.

Beasley, J.
1st October, 1926. } C. S. No. 130 of 1924.

Contract Act, S. 178—Entrustment of diamonds for inspection, valuation and return—Pledge of the diamonds—Pledgee whether protected.

Where the first defendant obtained from the plaintiff some diamonds for the purpose of inspection, valuation and return and the letter also stated that the value is so much per carat, and the first defendant pledged them the next day with the other defendants, and the plaintiff sought to recover them from these defendants : *Held*, that the transaction evidenced by the letter of inspection was a mere entrustment for a specific purpose and not a sale on credit basis ; that he had no such possession as is contemplated in S. 178 of the Contract Act so as to pass title by way of pledge and that the pledgee was not protected as there was want of good faith on his part. *Greenwood* v. *Holquett*, 12 Beng. L. R. 42 followed.

Vere Mockett, T.D. Srinivasachari and *T. Chakravarti Aiyangar* for Plaintiff.

Imamuddin for Defendant.

N. S.

The Chief Justice, Jackson and Sundaram Chetty, JJ.
1st October, 1926. } C. M. P. No. 3304 of 1926.

Certiorari, writ of—Jurisdiction of High Court to issue—Discretionary power—Application to issue writ to the Commissioner of the Corporation and Small Cause Court Chief Judge to call up

their orders invalidating the nomination paper of an election candidate—Applicant not raising the point of absence of jurisdiction before the Lower Court but arguing the case on the merits—Whether precluded from raising the point before the High Court.

In issuing a writ of certiorari, the High Court does not act under any statute but acts under the inherent power devolved upon it from the old Supreme Court of Madras. Consequently it stands, with regard to the prerogative rights, in the same position as the Court of King's Bench in England and follows the rules laid down by that Court in the decided English cases as to the scope and limitations of its jurisdiction. Where an applicant for a writ of certiorari to call up the orders of the Commissioner of the Corporation of Madras and the Chief Judge of the Small Cause Court holding that the nomination paper of an election candidate is invalid, on the ground that both the officers acted without jurisdiction, did not raise the point of absence of jurisdiction before the Lower Court but argued the matter on the merits.

Held, that the failure to object to the jurisdiction coupled with arguing the case on the merits before the Lower Court precluded the High Court from exercising the discretionary jurisdiction vested in the High Court in his favour. 29 L. J. (N. S.) M. C. 39, 29 L. J. (N. S.) M. C. 203, 32 L.J.M.C. 257, (1914) 1 K.B. 608, (1919) 2 K.B. 374 referred to.

K. S. Krishnaswami Aiyangar and *K. S. Rajagopala Aiyangar* for Petitioner.

Vere Mockett and *S. Rangaswami Aiyangar* for Respondent.

N. S.

Sundaram Chetty, J.
7th October, 1926.
S. A. No. 615 of 1924.

Limitation Act, Art. 144—*Adverse possession*—De facto *guardian's possession of minor's property—Whether adverse to the minor.*

The possession of a *de facto* guardian of a Hindu minor is in law the possession of the minor. Consequently he cannot, by using the properties of the minor, get a title by adverse possession. 30 M. 145, 35 B. 79 followed. 45 M. 361 distinguished.

Ch. Raghava Rao for Appellant.

K. Rajah Aiyar for Respondent.

N. S.

Srinivasa Aiyangar, J. *7th October, 1926.*	In the matter of the Specific Relief Act and Madras City Municipal Act and In the matter of the Election of 29th Division, Royapettah.

Madras City Municipal Act (IV of 1919), S.55 (2)—Election—Time of holding—Whether limited to August and September only—Provision directory and not mandatory—Rules framed under the Act—Rules 5 and 6—Construction of—Notification under R.5—Three days' time whether necessary—"Governor in Council," whether means Governor acting with Ministers—Government of India Act, S. 46.

S. 55 (2) of the Madras City Municipal Act which provides that vacancies arising by efflux of time in the Office of Divisional Councillor shall be filled at ordinary election which shall be fixed by the Commissioner to take place on such days in the months of August and September next preceding the vacancies as he thinks fit, is merely directory and not mandatory. It cannot be said that there is no power to hold the election in October.

Rule 5 of the Rules framed by the Government under the City Municipal Act does not merely create a contingent power in the Governor in Council but provides for the exercise of the power recognised to exist in the authority on one of the occasions in which such exercise becomes necessary. The rule does not contemplate only one fresh date being fixed by the Governor in Council but a series of fresh dates from time to time or as occasion may require.

The three days referred to in R. 5 are the three days indicated in R. 6 and not any different period of time. R. 6 is not one of the rules which can be dispensed with under the provisions of R. 5. Hence at least three days' notice of the election should be given as provided in R. 6 even in respect of an election for which a fresh date is fixed under R. 5.

The words " Governor in Council " in R. 5 should be read as the Governor acting with Ministers as provided in S. 46 of the Government of India Act.

N. Chandrasekhara Aiyar, V. C. Gopalarathnam and *S. Parthasarathi* for Petitioners.

S. Rangaswami Aiyangar and *D. Chakrapani Aiyangar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ. *8th October, 1926.*	S. A. No. 1803 of 1923.

Limitation Act, Art. 132—Suit on first mortgage and decree thereon—Payment of the decree amount by the second mortgagee—Suit by the mortgagor for redemption of the second mortgage—Second mortgagee defendant claiming right of subrogation to the first mortgage—Limitation.

A suit was instituted on a first mortgage and a decree was obtained. Before the properties were brought to sale in execution of the decree, the second mortgagee paid off the decree amount. More than

three years after the date of this payment and twelve years after the date when the amount on the first mortgage became due and payable the mortgagor brought a suit for the redemption of the second mortgage. The second mortgagee defendant claimed that he should be also paid the decree amount in the first mortgagee's suit which he had paid off on the ground that he was entitled to it by subrogation.

Held, that his subrogation right would have been barred on that date and that therefore he cannot claim the payment of that amount.

A puisne mortgagee who pays off a prior mortgage acquires all the rights of the prior mortgagee as such under S 74 of the Transfer of Property Act and the fact that a decree was obtained on the prior mortgage when the payment was made does not make any difference. The period of limitation within which the puisne mortgagee can enforce the rights of the prior mortgagee to which he has become entitled is the same as that for a suit on the prior mortgage itself. 39 C. 527 (P. C.) followed. 44 A. 67 and 47 M. L. J. 316 not followed. 27 A. 325 (P. C.) and 68 I. C. 707 referred to.

K. Subba Rao for *V. Ramadoss* for Appellant.

B. Somayya for Respondent.

N. S.

Curgenven, J.
8th October, 1926. } Cr. R. C. No. 135 of 1926.

Criminal Procedure Code, S. 526 (8)—Adjournment of case—Award of costs—Legality of.

There is no provision in the Criminal Procedure Code for the award of costs when a criminal case is adjourned under S. 526 (8) of the Criminal Procedure Code.

J. C. Adam (Public Prosecutor) for the Crown.

P. N. Appusami Aiyar for Accused.

N. S.

Sundaram Chetty, J.
11th October, 1926. } C. R. P. No. 329 of 1925.

Civil Procedure Code, S. 115 and O. 33, R. (5) (d)—Application to sue in forma pauperis*—Rejection of—Revision—Duty of Court to confine itself to the petition.*

A revision lies to the High Court against an order of the District Munsif rejecting an application to sue in *forma pauperis* under O. 33, R. 5 (*d*) of the Civil Procedure Code. 13 M. L. J. 292 (F. B.), 41 Mad. 620, 18 L. W. 53 referred to. 44 A. 248 not followed.

A Court acts without jurisdiction if it travels beyond the four corners of the petition to determine whether it discloses a cause of action or not.

Where the District Munsif surmising that an agreement referred to in the petition but not filed would be inadmissible in evidence, rejected the petition under O. 33, R. 5 (*d*) of the Civil Procedure Code, *held*, on revision, that the order must be set aside, as the validity

or otherwise of the agreement was a matter to be determined only at the trial.

V. Viyanna for Petitioner.

K. Venkatrama Raju for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
11th October, 1926. } R. T. No. 64 of 1926.

Criminal Procedure Code, S. 288—Evidence Act, S. 6—Statements made by eye-witnesses to others immediately after the occurrence— Admissibility—Criminal Procedure Code, S. 164—Statement before the committing Magistrate, whether can be used as substantive evidence.

A statement made by a prosecution witness before the committing Magistrate can only be used for the purpose of contradicting the witness and cannot be used as substantive evidence.

Statements made by an eye-witness to others immediately after the occurrence are admissible under S. 6 of the Evidence Act.

V. L. Ethiraj and *K. G. Srinivasa Aiyar* for Accused.

J. C. Adam for the Crown.

N. S.

Odgers and Jackson, JJ.
12th October, 1926. } C. M. A. No. 510 of 1925.

Succession Certificate Act, S. 4—Amount due under an insurance policy—Whether a debt.

The amount due under an insurance policy payable at the age of 55 or death is a " debt " within the meaning of S. 4 of the Succession Certificate Act.

K. Srinivasa Rao for Appellant.

N. S.

Ramesam, J.
12th October, 1926. } S. A. No. 1606 of 1923.

Registration Act, Ss. 21 and 22 and R. 17—Description of property—Sufficiency of.

A partition deed provided that " the properties purchased in the name of our aunt as our natural guardian in the villages of *S* and *P* shall be divided between us in equal halves." *Held*, that the description of the properties was sufficient for the purposes of registration of the document. The fact that the survey numbers were not mentioned was immaterial.

If a notification under Section 22 (1) provides that in certain districts the description shall be in a certain manner and does not give any further direction, the proviso under clause 2 will have effect of entitling a document to be registered provided the description is sufficient to identify the property. The word " practicable " in S. 21 (3) means practicable with reference to the parties. 16 L. W. 287 referred to. 24 L. W. 375 at 377 followed.

K. Bhashyam Aiyangar for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for Respondent.

N. S.

Odgers and Curgenven, JJ. *13th October*, 1926. — C. M. A. No. 386 of 1925.

Civil Procedure Code, S. 92 — Decree directing trustee to pay monies—Whether can be passed in a suit under the section—Appeal to High Court—Taking of security by the Lower Court pending the appeal—Whether ultra vires—*Enforceability of security in execution—Civil Procedure Code, S. 145 — Covenant by the surety to pay interest—Enforceability of.*

In a suit under S. 92, Civil Procedure Code, for the framing of a scheme, for removal of the trustee and for accounts, the Court found that a certain sum had to be accounted for by the trustee-defendant and passed a decree "that the trustee-defendant *shall be liable* to make good to the temple the amount". The trustee-defendant appealed to the High Court and after the preferring of the appeal when the decree was sought to be executed in the Lower Court, execution was stayed by the Lower Court on the appellant furnishing security pending the appeal. The High Court confirmed the Lower Court's decree in the appeal. The decree was then sought to be executed.

Held, (1) that the decree was not a mere declaratory decree but one capable of execution, 36 C. L. J. 101 referred to ; (2) that such a decree could be passed in a suit under S. 92, Civil Procedure Code, 14 L. W. 238, 28 I.C. 886 referred to ; (3) that, where the decree is ambiguous, it could be construed in the light of the pleadings and the judgment, 31 I. C. 478, 33 I. C. 561 referred to ; (4) that the taking of the security by the Lower Court while the appeal was pending in the Lower Court was not *ultra vires* of the powers of the Lower Court, 2 I. A. 219, 7 M. 400, 5 C. 27, 48 M. L. J. 121 referred to. 35 A. 119 distinguished ; (5) that the security bond could be enforced in execution, 45 A. 649, 41 M. 327 referred to ; (6) that the surety could be compelled to pay interest which he had covenanted to pay, though the decree did not direct it.

A. C. Sampath Aiyangar for Appellant.

S. T. Srinivasagopalachari and *A. V. Viswanatha Sastri* for Respondent.

N. S.

Odgers and Jackson, JJ. *13th October*, 1926. — C. R. P. No. 294 of 1925.

Madras Local Boards Act, S. 228—Bona fide *assessment—Jurisdiction of Civil Court to interfere with.*

Where there has been a *bona fide* assessment by a Taluk Board and no malice is alleged against the Board, the assessment cannot be questioned in a Civil Court.

P. V. Rangaram for *Sir K. V. Reddi* for Petitioner.

N. Sivaramakrishna Aiyar for Respondent.

N. S.

Reilly, J.
5th October, 1926. } C. R. P. No. 354 of 1925.

Civil Procedure Code, S. 115—*Other remedy available—Interference in revision—Personal decree against Hindu widow—Judgment directing decree against the assets of husband—Attachment of husband's assets in execution—Objection by the daughters.*

An attachment of certain properties of the husband as assets in the hands of the widow was made in execution of a decree which had been passed personally against her, though the judgment had directed a decree against the assets.

Objection was made by the daughters of the last male-holder to the attachment whereupon the Court directed the attachment to be withdrawn except as to the life-interest of the widow which was all that could be attached under the decree so long as the decree had not been sought to be brought into conformity with the judgment by an application under Section 152, Civil Procedure Code.

On revision, *held*, that the High Court should not interfere with the order of the Lower Court, there being a separate remedy available to the attaching decree-holder by way of a suit under O. 21, R. 63.

Quaere : Whether the daughters who have only a *spes succcssionis* during their mother's life time have an 'interest' in the properties attached to entitle them to apply under O. 21, R. 58.

K. Balasubrahmania Aiyar for Petitioner.

Ch. Raghava Rao for Respondent.

N. S.

Sundaram Chetty, J.
6th October, 1926. } C. R. P. No. 363 of 1925.

Provincial Small Cause Courts Act, Sch. I, Art. 15—*Contract —Suit for refund of advance paid—Whether a suit for specific performance.*

A suit for refund of moneys paid by one person to another on account of that other's breach of contract is not a suit for specific performance within Art. 15, Sch. I of the Provincial Small Cause Courts Act and is as such cognizable by a Court of Small Causes.

K. Balasubrahmania Aiyar for Petitioner.

Ch. Raghava Rao for Respondent.

N. S.

Devadoss, J.
8th October, 1926. } S. A. No. 1880 of 1923.

Defamation—Qualified privilege—Relevant matters—Actual malice—Proof of.

A party is entitled to qualified privilege in respect of statements contained in a reply to a registered notice which are relevant to the matter raised by the notice and no action for defamation can lie against him unless actual malice is proved.

N. Rama Rao for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

N R C

Odgers, J.
10th October, 1926. } S. A. No. 477 of 1924.

Civil Procedure Code, S. 64—*Decree-holder consenting to the private alienation by the judgment-debtor—Whether estopped from questioning the sale.*

The terms of S. 64, C. P. Code, are imperative and there can be no estoppel as against a decree-holder who consents to a private sale of the properties by the judgment-debtor subsequent to his attachment, such a sale being not merely voidable, but altogether void as against all claims enforceable under the attachment. Such a decree-holder is accordingly entitled to proceed against the properties then sold.

T. R. Arunachela Aiyar for *B. Somayya* for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Curgenven, J.
14th October, 1926. } C. R. P. No. 401 of 1924.

Civil Procedure Code, S. 152—*Decree in conformity with judgment—Whether can be amended.*

A Court has power to amend its decree by rectifying a mistake even though the decree is in conformity with the judgment. 14 L. W. 445, (1914) M. W. N. 107, 16 A. L. J. 149, 18 A. L. J. 501, 22 A. L. J. 215, 28 C. W. N. 873 referred to. 3 L. W. 499 distinguished.

P. S. Ramachandra Aiyar for *P. S. Narayanaswami Aiyar* for Petitioner.

C. Unikanda Menon for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
14th October, 1926. } S. A. No. 1349 of 1923.

Contract—Stranger to the contract—Right to sue on the contract—Award based on agreement of parties, whether a contract.

A person who is not a party to a contract can sue on the contract in exceptional cases. The English doctrines that a stranger to a contract cannot sue upon it should be applied in India only with flexibility. 32 A. 410 (P. C.) referred to. A judgment by consent will operate as a contract. Where the parties agree before the arbitrators about their disputes and an award is passed by them in terms of the agreement, it is a misnomer to call it an award. It is really an agreement of the parties and consequently a person who is not a party to it can sue upon it. 6 A 322 (P. C.) distinguished.

T. A. Vijiaraghavachari for Appellant.

V. Ramasami Aiyar for *K. Rajah Aiyar* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
14th October, 1926. } C. M. S. A. No. 102 of 1924.

Civil Procedure Code, O. 21, *R.* 53 (6)—*Notice under, whether necessary before attachment is complete.*

Their Lordships referred to a Full Bench the question whether a notice under O. 21, R. 53 (6) of the Civil Procedure Code is necessary before an attachment under that rule is complete. 24 M. L. T. 495, 13 L. W. 34 referred to.

B. Somayya and *E. Krishnamurthi* for Appellant.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondent.

Jackson, J.
14th October, 1926. } Cr. Rev. Case No. 585 of 1926.

Practice—Criminal trial—Summary case—Plea of guilty on charge of theft—Sentence pronounced but judgment written later from memory—Propriety of.

The accused was put up for trial on a charge of theft before a first class Bench of Magistrates. The case was tried under the summary procedure and on a plea of guilty by the accused, he was sentenced to 2 months' rigorous imprisonment in open Court. No judgment was delivered then, and subsequently when the accused applied for a copy of the judgment, the Chairman of the Bench wrote a judgment from memory, there being no record of evidence. *Held*, the procedure was illegal.

M. C. Sridharan for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Curgenven, J.
18th October, 1926. } Cr. Rev. Case No. 686 of 1926.

Criminal Procedure Code, S. 259—Dismissal of complaint—Subsequent application for restoration—Duty of Court.

A complaint was dismissed under S. 259, Cr. P. Code. Subsequently an application was put in by the complainant for restoration with a fresh complaint and the Magistrate took the case on file. *Held*, the proceedings were quite proper, as amounting either to a rehearing of the original complaint or taking on file the second complaint. 29 Mad. 126 (F. B.) applied ; 18 M. L. J. 561 followed.

V. Suryanarayana for Petitioner.

T. S. V.

Jackson, J.
18th October, 1926. } S. A. No. 215 of 1924.

Malabar Compensation for Tenants' Improvements Act, Ss. 5 and 19—Kushikanom of 1884 from Jenmi—Rates fixed for compensation—Subsequent kanom of 1903—Lessee attorning to kanomdar in 1905, agreeing to rates of compensation as fixed in 1884—Kanom and kushikanom rights becoming vested in third party—Suit for redemption of kanom of 1903—Compensation at what rate to be payable—Contract rate or Act rate.

A *Jenmi* in Malabar granted a *kushikanom* lease of certain properties in 1884 and the *marupat* recited that compensation for improvements was to be paid for at a certain rate. In 1903 the *Jenmi* granted a *kanom* of the same properties and in 1905 the heirs of the *kushikanom* lessee attorned to the *kanomdar* direct, agreeing to receive the same rates of compensation as fixed in the *marupat* of 1884. Sub-

sequently as a result of a series of assignments, both the *kanom* and *kushikanom* rights became vested in defendants 2 to 8 in the year 1919. A *melkanomdar* from the *Jenmi* sued the defendants for redeeming the *kanom* of 1903 and claimed to pay compensation for the improvements effected between 1884 and 1905 at the rates fixed in the *marupat*, while the defendants claimed the rates payable under Madras Act I of 1900. *Held*, S. 19 of the Act made the contract in the *marupat* of 1905 unenforceable, and the tenants were entitled to the full rates of compensation as provided in the Malabar Compensation for Tenants' Improvements Act.

S. Ranganatha Aiyar for Appellant.

T. S. Viswanatha Aiyar and *D. A. Krishna Variar* for Respondent.

T. S. V.

Ramesam and Reilly, JJ.
18th October, 1926.

C. R. P. No. 678 of 1922.

Landlord and tenant—Tenant-in-common—Liability for the rent of the whole land—Dharmasanam grants.

A tenant-in-common is liable to the landlord for the entire rent, as there is a privity of estate between him and the landlord as regards the entire land. But if there is division between the several tenants-in-common by metes and bounds or if the lands are held by them in physical severalty, each one of them will be liable only for the proportionate share of the rent on his holding. 1913 (1) K. B. 469 and 53 Cal. 197 referred to.

The same principle applies in the case of Dharmasanam grants also.

K. V. Sesha Aiyangar for Petitioner.

K. Kuttikrishna Menon for Respondent.

N. S.

Curgenven, J.
19th October, 1926.

Cr. Rev. Case No. 163 of 1926.

Madras District Municipalities Act (V of 1920), Ss. 3 (24) (*a*), 317 (*a*) *and* (*c*)*—Reconstruction—What is—Prosecution for commencing without permission of Chairman—Plea of limitation—Conviction under* S. 317 (*c*)*—Propriety of.*

The accused was charged for an offence under S. 317 (*a*) of the Madras District Municipalities Act in that he commenced re-construction of a building without the permission of the Chairman. The plea was that the complaint was time barred under S. 347, as part of the re-construction had been commenced more than 3 months prior to the complaint and that there was no re-construction within the definition in S. 3 (24) (*a*). The Court below held that the definition of "re-construction" in the section was not exhaustive but held that S. 317 (*a*) would not apply and altered the conviction to one under S. 317 (*c*). *Held*, in revision, that S. 317 (*c*) was not applicable as it applies only to cases where the commencement of re-construction is legal, but it is "carried on or completed" in an illegal way. Scope of Ss. 3 (24) (*a*), 317 (*a*) and 317 (*c*) considered.

V. Suryanarayana for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Sundaram Chetty, JJ.
19th October, 1926.

L. P. A. No. 205 of 1925.

Hindu Law—Joint family—Father—Decree against—Execution—Sale—What interest passes—Admissibility of extraneous evidence—Judgment-creditor not defining the share of the father—Civil Procedure Code, O 21, R. 13.

In determining what interest passes to the purchaser at a sale in execution of a decree against the father of a joint Hindu family, extraneous evidence ought not to be allowed to find out the intention of parties as to what was intended to be sold, when the sale certificate itself is clear and free from ambiguity. 44 M. 483 (P. C.) followed.

Where the judgment-creditor does not define the share or interest of the judgment-debtor (father) as he is bound to do under the provisions of O. 21, R. 13, C. P. Code, it must be taken that the property in its entirety as described in the sale proclamation and in the sale certificate was intended to be sold.

S. Varadachariar and *C. A. Seshagiri Sastri* for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for Respondent.

N. S.

Sundaram Chetty, J.
19th October, 1926.

C. M. S. A. No. 35 of 1925
and
C. R. P. No. 545 or 1925.

Madras Estates Land Act, Ss. 189 and 192—Decree in rent suit—Application for execution—Appeal—Maintainability—Civil Procedure Code, S. 47.

Orders passed on applications for execution of decrees passed in rent suits under the Madras Estates Land Act are appealable, as S. 47 of the C. P. Code is not one of the sections excepted under S. 192 of the Act.

Where the District Judge held that an appeal did not lie from such an order and dismissed the appeal, a second appeal lies to the High Court against the order of the District Judge.

P. Chenchiah for *P. Venkatramana Rao* for Appellant.

Respondent unrepresented.

N. S.

Waller, J.
20th October, 1926.

S. A. No. 1127 of 1925.

Madras Forest Act (V of 1882), S. 66—Lease of right to collect forest produce—Lease amounts payable in four equal instalments—Second instalment not paid—Notice by Government—Right of Government to proceed under S. 66.

Under a lease of the right to collect forest produce the lease amount was made payable in four equal instalments. The second instalment was not paid and the Government gave notice to the lessee that he should not collect forest produce till the arrear was paid. Subsequently the Government realised the amount by bringing the properties of the

lessee to sale under S. 66. *Held*, the contract of lease not having been cancelled, the amount due was money "payable on account of forest produce" within S. 66 and Government had the right to bring the properties to sale as if the amount due was an arrear of land revenue. 24 M. L. J. 426 distinguished.

A. C. Sampath Aiyangar for Appellant.

The Government Pleader and *T. L. Venkatrama Aiyar* for Respondents.

N. S.

Wallace and Madhavan Nair, JJ.
21st October, 1926.

C. M. A. No. 416 of 1924.

Civil Procedure Code, O. 9, R. 9 and O. 17, Rr. 2 and 3—Proof of sufficient cause for non-appearance—Duty of Court to restore suit—Default in paying batta and filing witness list—Whether case falls under O. 17, R. 3.

What under O. 9, R. 9 C. P. Code, the Court has to consider is whether there was sufficient cause for plaintiff not appearing on the day fixed for hearing. If such sufficient cause is shown the Court is bound to restore the suit and it is no answer to the application for restoration to say that the party had been guilty of failure to pay batta and to file a list of witnesses as directed by the Court. Such default on the part of the plaintiff does not bring the case under O. 17, R. 3 and the case remains as one under O. 17, R. 2 owing to the plaintiff's non-appearance on the day fixed for hearing and the Court is bound to dispose of the suit in the mode directed in that behalf by O. 9, R. 9, C. P. Code.

Ch. Raghava Rao for Appellant.

K. Ramamurthi for *K. Kameswara Rao* for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
21st October, 1926.

C. M. A. No. 378 of 1924.

Court Fees Act, S. 19 (i) and Sch. I, Art. 11—Will by the father of joint Hindu family—Application for probate by son—Probate duty payable.

The father of a Hindu joint family executed a will bequeathing some of the joint family properties to certain persons and the rest to his three sons. An application for probate of the will was filed by the sons. *Held*, the Court-fee payable must be calculated on the value of the one-fourth share to which the father would be entitled. 33 Mad. 93 followed.

V. Govindarajachari for *A. Krishnaswami Aiyar* for Appellant.

The Government Pleader for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J. *26th October*, 1926. } A. S No. 434 of 1924.

Hindu Law—Widow—Maintenance—Rate of—How fixed—Arrears of maintenance—If demand necessary—If right to arrears is a legal right.

The rate of maintenance to be awarded to the widow of a deceased co-parcener in a joint Hindu family is in the discretion of the Court to be fixed with reference to the income of the family and the needs of the widow, the only limit being that in no event should she be allowed a rate which would exceed the income from her husband's share of the family properties.

As for past maintenance, no demand is necessary to entitle her to it. Mere non-payment of maintenance to a person entitled thereto constitutes *prima facie* proof of wrongful withholding. 24 Mad. 147 (P. C.) and 21 M. L. J. 706 and 482 followed.

It is a legal right and the co-parceners cannot escape liability unless adequate grounds are shown for inferring that she had waived or abandoned that right.

Vere Mockett instructed by *K. S. Desikan* for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N. S.

Odgers and Jackson, JJ. *26th October*, 1926. } A. S. No. 135 of 1923.

Grant—Subsequent inam statement and inam proceedings—Conflicting or inconsistent statements—Evidentiary value.

Where the original grant of some properties to a person makes it clear that the grant was of the fee simple without being burdened with any trust, an erroneous description of the properties by parties before the Inam Commissioner as trust properties and the consequent confirmation of the inam as Devadayam will not alter the nature of the property from that of being fee simple to that of being burdened with a trust. In the case of a conflict between the original grant and the inam title deed the former will prevail when the terms are clear and unambiguous. 44 Mad. 421 (P. C.) followed. 39 Bom. 69 distinguished.

P. R. Ganapathi Aiyar for Appellant.

T. R. Ramachandra Aiyar and *E. Vinayaka Row* for Respondent

N. S.

The Chief Justice. *26th October*, 1926. } A. S. No. 434 of 1922 and A. S. No. 279 of 1923.

Specific Relief Act, Ss. 14 to 17—Lease for 99 years—Covenant for renewal—Assignee of portion of the leasehold properties—Suit for specific performance—Maintainability.

A lease for 99 years contained a stipulation that the said lease "should and might be renewed for a further term of 99 years upon such terms and conditions as should be judged reasonable". A portion of

N. R. C.

the leasehold properties was assigned by the lessee and the lessee brought a suit for specific performance of the covenant for renewal.

Held (agreeing with *Venkatasubba Rao, J.*, who differed from *Krishnan, J.*) (1) the covenant for renewal was certain and definite and not vague, and (2) the suit by the assignee of the portion of the leasehold properties was maintainable. 52 C. 335 (P. C.) distinguished. (1838) 8 L. J. C. P. 59 : 132 E. R. 981 followed.

The Government Pleader for Appellant.

R. N. Aingar instructed by Messrs. *King* and *Patridge* for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
27th October, 1926.

O. S. A. No. 15 of 1926.

Presidency Towns Insolvency Act, S. 55—"*Transfer*"—*Agreement to dissolve partnership with a view to defraud creditors.*

An agreement entered into between the partners of a partnership business by means of which the whole business with all its assets and liabilities was transferred to one of them who was afterwards adjudicated an insolvent and the others were released of all their obligations to the partnership and were each paid a certain sum of money in addition amounts to a "transfer" within the meaning of S. 55 of the Presidency Towns Insolvency Act.

K. Ramanatha Shenai instructed by *V. Krishnan* for Appellant.

S. Duraiswami Aiyar instructed by *Messrs. Atkinson & Co.* for Respondent.

N. S.

Odgers and Jackson, JJ.
27th October, 1926.

C. M A. No. 275 of 1926.

Civil Procedure Code, S. 151 *and O.* 47, *R.* 1—*Execution application—Dismissal for default—Power of executing Court to restore it to file.*

An executing Court has no power to restore to file an execution application dismissed for default of the appearance of the decree-holder. Such an order cannot be supported as coming within the purview of O. 47, R. 1, as the words "for any other sufficient reason" must be read *ejusdem generis* with the previous clauses. Nor can it be supported as coming within the purview of S. 151, as the order of dismissal does not prevent a fresh application for execution being filed. The fact that a fresh execution application would be barred by limitation is no ground for exercising the inherent powers under S. 151. 51 M. L. J. 219 followed. 3 L. 27 (P. C.) referred to. 2 L. 66 dissented from.

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

N. Chandrasekhara Aiyar for Respondent.

N. S.

Curgenven, J.
28th October, 1926. } Cr. Rev. Case No. 329 of 1926.

Criminal Procedure Code, S. 540—Examination of persons as Court witnesses without previous notice to the parties—Legality—Evidence Act, S. 112—Sambandam in Malabar.

In a petition for maintenance under S. 488 of the Cr. P. Code, after the evidence on behalf of the petitioner and the counter-petitioner was taken the Magistrate, without giving previous notice to the parties, called four people of the village and examined them as Court witnesses. The Magistrate based his judgment on the evidence of the Court witnesses *alone* and found that the counter-petitioner was the father of the child and ordered maintenance.

Held (on revision) that the powers conferred by S. 540 should not be exercised at the behest of any party and consequently the order should be set aside. 12 A. L. J. 15 and 37 C. L. J. 173 followed.

Quaere: Whether a Sambandam is a valid marriage so as to invoke the principle of S. 112 of Evidence Act regarding the paternity of the child ?

P. Govinda Menon for Petitioner.

A. Sivarama Menon for Respondent

N. S.

Curgenven, J.
28th October, 1926. } Cr. Rev. Case Nos. 278, 364 and 418 of 1926.

Criminal Procedure Code, S. 247—Complainant absent—Dismissal of complaint and acquittal of accused—Subsequent order of Magistrate restoring complaint to file—Validity of—Revision.

A complaint was dismissed by a magistrate under S. 247, Cr. P. Code, as the complainant was absent and the accused was acquitted. On application by the complainant, the Magistrate restored the complaint to file.

Held (on revision) that the order of acquittal was legal when it was passed and the order restoring the complaint to file was *ultra vires*. 38 M. 1028 and Cr. Rev. Case No. 772 of 1925 followed. Powers of the High Court in revision against orders under S. 247 considered.

K. Kameswara Row for Complainant.

V. Suryanarayana for Accused.

N. S.

Waller, J.
28th October, 1926. } S. A. Nos. 479 and 480 of 1925.

Madras Estates Land Act, Sch. A, Art. 8—Limitation Act, Art. 116—Suit to recover rent due under a registered lease under the Estates Land Act—Period of limitation.

The period of limitation for a summary suit instituted by the landlord to recover rent from the tenants due under a registered lese under the provisions of the Madras Estates Land Act is not six years under Art. 116 of the Limitation Act, but three years under Art. 8 of Sch. A of the Madras Estates Land Act.

R. Kuppuswami Aiyar for Appellant.

J. A. Pinto for Respondent.

N. S.

The Chief Justice and Beasley, J. 19*th October*, 1926. } C. S. No. 324 of 1925.

Letters Patent (Madras High Court) Clause 12*—Cause of action arising partly out of Madras—Suit in Madras—Leave to sue not obtained—Jurisdiction of High Court—" Dwell, carry on business, personally work for gain "—Meaning of.*

Some gold threads were seized at Cuddalore by the Customs Officer of the Cuddalore circle as having been smuggled, in pursuance of an order of confiscation passed by the Collector of Madras. A suit was filed against the Secretary of State for India in the High Court of Madras (original side) for the recovery of them on the ground that duty had been paid for the goods. No leave to sue was obtained.

Held, that the goods having been seized at Cuddalore, part of the cause of action arose there and the mere fact that the order of confiscation was passed by the Collector of Madras did not show that the entire cause of action arose at Madras. The word " dwell " in clause 12 applies only to an individual and not to legal persons like the Secretary of State. The words " carry on business " apply only to cases of *Commercial* business and do not comprise the carrying on of the Government business.

K. Narasimha Aiyar for Plaintiff.

The Advocate-General for Defendant.

N. S.

Curgenven, J. 28*th October*, 1926. } C. R. P. No. 875 of 1925.

Civil Procedure Code, O. 9, R. 13*—Compromise Decree—One of the parties* ex parte *at the time of the compromise—Application by him to set aside the* ex parte *decree—Power of Court to set it aside.*

In a suit against 3 defendants, defendants 2 and 3 were *ex parte* and the 1st defendant compromised the suit. Subsequently the 2nd defendant applied for setting aside the *ex parte* decree and it was set aside so far as he was concerned. The Plaintiff applied in Revision to the High Court that the decree in its entirety ought to have been set aside even as against the 1st defendant who had compromised, as otherwise, there would be inconsistent decrees.

Held, that the fact that the decree was a compromise decree as against the first defendant was no bar to the application of the provisions of O. 9, R. 13, Civil Procedure Code and, the decree being one and indivisible in its nature, the whole decree ought to be set aside.

K. S. Jayarama Iyer for Petitioner.

N. R. Govindachari for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ. 28*th October*, 1926. } A. S. No. 62 of 1921.

Evidence Act, S. 33 proviso—" Parties or representatives in interest "—Meaning of—Deposition in a previous suit between the

natural father of an adopted boy and another—Subsequent suit between the adopted boy and the other—Natural father whether the representative in interest of the adopted boy—Hindu Law—Adoption—Consent of Sapindas—Father and son—Consent of father—Necessity of—Acknowledge of paternity—Onus of proof.

For a prior deposition to be admissible under S. 33 of the Evidence Act, the party in the prior suit should have represented in interest the party in the subsequent suit. 40 E.R. 498 followed. The natural father of an adopted boy who was a party to a prior suit cannot be said to be a representative in interest of the adopted boy who is a party in a subsequent suit.

In the matter of obtaining consent of sapindas the sons are not on an equal decree with their father; consequently consent of father is necessary and sufficient. Acknowledges of parents that the child is their child shifts the burden of proving that the child is not theirs on the party who alleges it. Douglas Peerage case in Famous Notable British Trial series relied on.

T. R. Ramachandra Iyer, N. A. Krishna Iyer and *C. Rama Row* for Appellant.

S. Sreenivasa Aiyangar, A. Krishnasami Iyer and *S. Venkatesa Aiyangar* for Respondent.

N. S.

Jackson, J.
1st November, 1926. } S. A. Nos. 402 and 403 of 1924.

Evidence Act, S. 157—Question relating to boundaries. Document referring to such boundaries but not inter partes*—Persons connected with the transactions examined as witnesses—Admissibility of the document—*Res judicata*— General principles of—Decree for rent—Summons not in Civil Court served on the ryot—Subsequent suit by ryot for declaration of title to both the warams—If barred by* Res judicata.

Documents referring to the boundaries of properties in the suit, though not *inter partes* may be relevant and admissible under S. 157 of the Evidence Act, when the persons connected with the transactions have been examined as witnesses in the suit.

Where a landlord obtained a decree for rent in a prior suit and it was found that the summons had not been served on the ryot, a subsequent suit by the ryot for declaration of title to both the warams in a Civil Court is not barred by the general principles of *Res judicata* apart from S. 11 Civil Procedure Code.

K. S. Sankara Aiyar for Appellant.

T. M. Krishnasamier and *N. Sivaramakrishna Aiyar* for Respondent.

N. S.

Sir Kumarasami and Reilly, JJ.
1st November, 1926. } A. S. No. 205 of 1922.

Evidence Act, S. 33—Deposition heard by 3 out of 5 arbitrators—Whether amounts to evidence given before "a person authorized by law to take it" or in a "judicial proceeding."

Where 5 arbitrators were appointed to decide a dispute and the reference did not authorize some only of them to act in any matter, a deposition of a witness heard by 3 of the arbitrators in the absence of the other two is not admissible in a subsequent suit between the parties. 3 out of 5 arbitrators are not properly constituted to take evidence and the proceeding ceases to be judicial when some of the arbitrators are not present. Recording evidence may be a ministerial act but hearing it is a judicial act and in the absence of directions contra in the reference all the arbitrators must take part in hearing evidence. 12 M. 113 and 14 C. L. J. 143 applied.

A. Krishnasami Aiyar, B. Batyanarayana and *K. N. Rajagopala Sastry* for Appellant.

S. Varadachariar, T. V. Muthukrishna Aiyar, Y. Suryanarayana, K. S. Champakesa Aiyangar and *N. Muthusamy Aiyar* for Respondent.

N. S.

Waller, J.
2nd November, 1926. } S. A. No. 390 of 1924.

Transfer of Property Act, S. 3—"*Notice*"—*Surrender by a Hindu Widow—Recital of the same in sale-deed—Surrender vitiated by fraud—Vendee, whether purchaser without notice.*

A recital in a sale-deed that the vendor's title to the property is based on a relinquishment by a Hindu widow to whose husband he is the nearest reversioner is sufficient to put the vendee on enquiry as to the validity of the relinquishment and, if the relinquishment is, in fact, vitiated by fraud, he is not a *bona fide* purchaser for value without notice. 44 M. L. J. 527 referred to.

V. Govindarajachari for Appellant.

K. Bhimasankaram for *Mr. B. Satyanarayana* for Respondent.

N. S.

Curgenven, J.
2nd November, 1926. } C. R. C. No. 250 of 1926.

Criminal Procedure Code, S. 488—*Order for maintenance—Subsequent residence of wife with husband for some time and birth of a child—Wife subsequently leaving husband—Right to enforce the original order.*

After the passing of an order for maintenance the wife went and lived with her husband for some months and got a child. Subsequently she left her husband and applied to enforce the original order for maintenance.

Held, that the fact that she stayed with her husband for some months did not *ipso facto* cancel the original order which was only suspended during that time. 75 I. C. 529 followed.

P. N. Appusami Aiyar and *P. R. Srinivasan* for Petitioners.

V. Rajagopalachari for Respondent.

N. S.

Reilly, J.
2nd November, 1926. } S. A. No. 470 of 1924.

Inam—Resumption of service inam—Alienation by the holder of the inam of the entire properties granted in inam without reserving the annual net assessment for the service—Validity of the resumption.

A holder of a service inam alienated the entire properties comprised granted in inam without reserving the annual net assessment for the service and Government resumed the inam.

Held, that the alienation was invalid and the resumption by the Government was proper and valid. 42 M. 673 distinguished.

K. Rajah Aiyar for Appellant.

The Government Pleader and *R. Sethurama Sastry* for Respondents.

N. S.

Kumarasami Sastry and Reilly, JJ.
2nd November, 1926. } A. S. No. 168 of 1923.

Limitation Act, Art. 144—*Adverse possession—Tenants in common—Ouster—Clear evidence of—Non-receipt of rents.*

To constitute adverse possession as between tenants in common clear evidence of ouster to the knowledge of the person excluded is necessary. Mere non-receipt of rents by the person alleged to be excluded does not constitute ouster.

B. Satyanarayana for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

Reilly, J.
2nd November, 1926. } S. A. No. 210 of 1924.

Decree—Execution—Right legal representative not brought on record—Execution proceeded against a person in possession who was supposed to be the legal representative—Validity of.

Where in execution of a decree the right legal representative was not brought on record but execution was proceeded with against the person in possession of the properties who was supposed to be the legal representative, the execution proceedings are valid. 29 M. L. J. 698 followed.

Watrap S. Subramania Aiyar for Appellant.

T. V. Muthukrishna Aiyar and *A. C. Sampath Aiyangar* for Respondent.

N. S.

Krishnan and Venkata-subba Rao, JJ.
28th October, 1926.

S. A. No. 163 of 1924.

Malabar Law—Gift by a person to his wife and her children by him—Whether tavazhi property.

Properties gifted by a person to his wife and his children by her will not constitute tavazhi property when that woman has also got children left by a former husband. A tavazhi is a pure creature of law and cannot be created by any act of parties. Consequently a sub-tavazhi consisting of the children by one husband alone cannot be recognized as validly constituted.

Observations to the contrary in 39 M. 317 and 42 M. 869 Dissented from.

D. A. Krishna Warrior for Appellant.

K. P. M. Menon for Respondent.

N. S.

Curgenven, J.
2nd November, 1926.

S. A. No. 717 of 1924.

Madras District Municipalities Act, Ss. 207 and 214 (2)—Power of Municipality to call upon a house-owner to demolish a latrine as being insanitary—Suit in civil Court for declaration that notice issued by the Municipality is illegal—Maintainability.

A Municipality has power to call upon a house-owner to demolish a latrine in his house on the ground that it is insanitary and the Municipality is not bound to specify the place or the manner in which it ought to be reconstructed. Consequently, where the Municipality issues a notice to that effect, the Civil Court cannot entertain a suit for a declaration that the notice is illegal and for an injunction restraining the Municipality from enforcing the same.

V. Ramadoss for Appellant.

C. Venkatasubbaramiah for Respondent.

N. S.

Krishnan and Odgers, JJ.
3rd November, 1926.

A. Nos. 149 and 150 of 1925.

Civil Procedure Code, S. 92—Suit for a scheme in respect of a choultry used as a rest-house—Residents of the town where choultry is situated—Whether persons "having an interest."

Where the plaintiffs in a suit under S. 92, Civil Procedure Code, for a scheme in respect of a choulty used as a rest-house by the travellers and pilgrims merely claimed that they were residents of the town where the choulty was situated and as such interested in the well being of the institution, they cannot be said to be "persons having an interest in the trust" within the meaning of S. 92. 47 M. 884 P. C. Followed. 35 M. L. J. 661. Explained.

N. Rama Rao for Appellants.

P. Satyanarayana Rao for Respondents.

N. S.

N R C

Krishnan and Odgers, JJ.
3rd November, 1926. } A. S. No. 191 of 1925.

Land Acquisition Act, S. 23—*Market value—Cocoanut garden—Capitalisation of annual value method.*

In the case of a cocoanut garden, considering the future life of the garden, only 12 years' purchase or 13 years' purchase should be given as compensation and not 20 years' purchase as in the case of buildings fetching rent.

The Government Pleader for Appellant.

A. Satyanarayana for Respondent.

N. S.

Sundaram Chetty, J.
3rd November, 1926. } S. A. No. 504 of 1924.

Limitation Act, Art. 120—*Record of rights—Entry in—Suit for declaration that the entry is wrong and for setting aside the same—Suit Cognizable by District Munsiff but tried by a sub-Court—Legality of—Madras Estates Land Act—Dharmilla Inam of both the warams—Inamdar whether a landholder.*

The trial of a suit by a higher tribunal when it ought to have been tried by a lower tribunal is a mere irregularity and not an illegality which would vitiate the trial.

A suit under the Madras Estates Land Act for a declaration that an entry in the Record of Rights that the defendants had occupancy rights in the village was wrong and for setting aside the same is Governed by Article 120 of the Limitation Act and time must be computed from the date of the publication of the Record of Rights. 36 M. 383 and 34 I. C. 702. Approved and Followed.

The grantee of a Dharmilla Inam of both the warams is a landholder within the meaning of the Madras Estates Land Act, and tenants under him acquire occupancy rights. The presumption in the case of a Dharmilla Inam is always that it is a grant of ryoti land. 45 M. 716 F. B. applied.

G. Lakshmanna for Appellant.

P. Somasundaram and *P. Satyanarayana* for Respondent.

N. S.

Jackson, J.
3rd November, 1926. } S. A. No. 687 of 1924.

Interest—Printed heading in bill of tradesman—Whether amounts to a demand.

A printed heading in a bill of a tradesman that interest will be charged on the arrears after a certain time does not amount to a demand for payment of interest. 20 I. C. 194 Followed.

A. K. Madhava Rao for Appellant.

Watrap S. Subramania Aiyar for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ.
5th November, 1926.

A. S. No. 110 of 1923.

Transfer of Property Act, S. 52—Alienation subsequent to the filing of a suit in forma pauperis *but before it was registered as a suit—Whether affected by* lis pendens*—Decree—Arrangement between decree-holder and judgment-debtor not to decree the decree—Assignment of decree—Assignee with notice of the arrangement executing the decree and purchasing the properties—Rights of the purchaser.*

An alienation of the properties subsequent to the filing of a suit *in forma pauperis* in respect of those properties but before it was registered as a suit is affected by *lis pendens.* 30 A. 95 Followed.

The decree holder and the judgment-debtor entered into an arrangement that the decree-holder should not execute the decree in consideration of receiving certain amounts. The decree-holder received certain amounts from the judgment-debtor and did not execute the decree for a number of years. Subsequently the decree-holder assigned the decree to a third person who took it with notice of the arrangement between the decree-holder and the judgment-debtor. The assignee executed the decree and purchased the properties.

Held, (by Krishnan, J.) that the assignee of the decree-holder was not precluded from executing the decree because he was aware of the arrangement between the decree-holder and the judgment-debtor and therefore the execution and the sale were valid. 42 M. 338 Referred to (by Venkatasubba Rao, J.) that the doctrine of part performance applied and the assignee of the decree-holder who purchased the properties was not entitled to recover possession of the properties. 46 M. 919 Referred to.

T. M. Krishnasami Aiyar and *M. S. Vaidhinatha Aiyar* for Appellant.

C. V. Ananthakrishna Aiyar and *C. V. Harihara Aiyar* for Respondent.

N. S.

Krishnan and Odgers, JJ.
9th November, 1926.

O. S. A. No. 61 of 1925.

Partnership—Breach of some of the terms of the Partnership—Suit for damages—Maintainability.

A suit for damages by one partner against another for alleged breach of the terms of the partnership without asking for the dissolution of the partnership and for general accounts is not maintainable. 39 M. L. J. 257 P. C. Relied on 32 M. 76 Distinguished.

T. C. A. Anandalwan for Appellant.

K. S. Krishnaswami Iyengar for Respondent.

N. S.

Curgenven, J.
9th November, 1926.

S. A. No. 225 of 1924.

Will—Construction—Authority to mortgage—Hindu widow—Personal debt—Mortgage.

Where a testator granted a life estate to his widow and by his will authorized her to discharge the encumbrance on some of the items either from the surplus out of the income or on the liability of the hypotheca and the widow purporting to act under the authority discharged the mortgage by creating an usufructuary mortgage of one of the items and later on discharged this mortgage by borrowing monies on a promissory note executed by herself and another jointly and finally discharged this pronote by executing a simple mortgage of all the items of the property which had been originally mortgaged, *Held*, in a suit by the remainderman, that the last mortgage was not binding on him as the widow had no authority to mortgage the property for her personal debt evidenced by the pronote though the amount had been applied for the discharge of the husband's debt. 4 Bom. 5 Followed.

K. S. Jayarama Aiyar and *T. S. Venkatesa Aiyar* for Appellant.

E. Vinayaka Rao for Respondent.

N. S.

Odgers and Jackson, JJ.
9th November, 1926.

A. S. No. 128 of 1926.

Malabar Law—Suit for removal of karnavan and for accounts—Karnavan became a stani pending suit—If suit for account lies—Powers and liabilities of karnavan under Malabar Law.

The Junior members of a kovilagom in Malabar filed a suit for the removal of the Valia Thamburatti (Karnavati) and for accounts from her for her past mismanagement and also second defendant who was alleged to be her agent. The Lower Court held that this suit cannot any longer proceed as the karnavati cannot be removed and apart from removal no suit for accounts lies against the karnavati. On appeal by the junior members,

Held, a karnavan cannot be sued for accounts by the junior members apart from a suit for removal. The prayer for accounts is incidental to the prayer for removal. But a karnavan may be liable for acts of fraud or mis-management and he will be bound to recoup the losses of the members of the tarwad in a properly framed suit. The karnavan is only one among the members of the tarwad, all of whom have proprietory interests in the property. 5 L. W. 511 : 3 M. 169 : 23 M. L. J. 706 Followed.

C. V. Ananthakrishna Aiyar and *P. S. Narayanaswami Aiyar* for Appellants.

T. R. Ramachandra Aiyar and *K. P. Ramakrishna Aiyar* for Respondents.

N. S.

Waller and Madhavan Nair, JJ.
9th November, 1926. } A. S. No. 427 of 1925.

Land Acquisition Act, Ss. 18 and 31—Claimant claiming other lands in exchange and not money value—Deposit of amount by Land Acquisition Officer in Court and reference by him—Order of District Court that there was no reference under S. 18—Appeal—Whether lies.

A claimant in a land acquisition case put in a statement that he wanted other lands in exchange and not money compensation. He refused to receive the amount awarded and the Land Acquisition Officer deposited the amount in Court under S. 31 of the Land Acquisition Act and referred the matter to the Court. The District Court held that there was no reference under S. 18. *Held* that an appeal lay to the High Court against the aforesaid order.

M. Krishna Bharathi for Appellant.

The Government Pleader for Respondent.

N. S.

Jackson, J.
10th November, 1926. } S. A. No. 266 of 1924.

Lease—Heirs of lessee—Joint liability to pay rent.

The joint and several liability attaching to tenants in common under a lease is also enforceable by the landlord against their heirs.

The heirs unlike assignees cannot claim to have their liability restricted only to such share of the demised premises as they may be in possession of under an arrangement for partition to which the landlord is not a consenting party. C. R. P. No. 678 of 1922 distinguished. 53 Calcutta 197 and 1923 1 K. B. 469 followed.

P. Satyanarayana Rao for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Jackson, J.
10th November, 1926. } S. A. No. 566 of 1924.

Evidence Act, Ss. 13 and 32 (3) and (7)—Ancient documents—Recitals as to boundaries—Admissibility.

Recitals in a document about boundaries, even though the documents are ancient documents are not admissible in evidence under S. 13 or 32 (3) or (7).

T. M. Krishnasami Aiyar for Appellant.

K. Narasimha Aiyar for Respondent.

N. S.

Jackson, J.
10th November, 1926. } S. A. Nos. 1777 to 1793 of 1922.

Court-fees Act, S. 7, XI (cc)—Suit to recover property from tenant—Tenant denying landlord's title and setting up occupancy rights—Court-fee payable.

N R C

S. 7, XI (cc) is not confined to cases where the defendant is estopped from denying plaintiff's title.

S. Varadachariar and *A. Satyanarayana* for Appellant.

P. Venkatramana Rao and *K. S. Desikan* for Respondent.

N. S.

Curgenven, J.

10th November, 1926. — S. A. Nos. 283 and 300 of 1924.

Hindu Law—Alienations by widow—Suit by step-daughter impeaching the alienation—Decree for possession, mesne profits and costs—Appeal by alienees—Death of Plaintiff-Respondent—Sister's sons whether proper legal representatives.

A Hindu widow alienated the properties of the last male owner and her step-daughter as reversioner brought a suit after her death for recovery of possession of properties. She obtained a decree for possession, mesne profits and costs. The alienees appealed. Pending the appeal, the Plaintiff-Respondent died and her deceased sister's sons were brought on record as her legal representatives.

Held on appeal that the sister's sons are the proper legal representatives, because the suit was one of a representative character in so far as it was for possession of the properties. 39 M. 634 followed.

Held also that in so far as mesne profits and costs were concerned, in the absence of somebody coming and claiming the same, the persons who have been brought on record as the legal representatives will be entitled to the same and a decree can be given to them.

K. Kameswara Rao, M. Ramachandra Rao and *N. Rama Rao* for Appellant.

B. Satyanarayana for Respondent.

N. S.

Curgenven, J.

10th November, 1926. — S. A. No. 219 of 1924.

Evidence Act, S. 115—Representation of intention of a person —Whether sufficient to give rise to Estoppel—Limitation Act, Articles 123, 136 and 140—Bequest to a person—Life enjoyment to another till he was paid a certain amount—Suit by a purchaser from the devisee against the latter for possession on payment of the amount—Limitation.

A mere representation of the intention of a person as to what he would do in the future cannot give rise to an estoppel though the person to whom such representation was made was mislead by such representation. 5 H. L. C. 185, 1896 A. C. 231 (238) and 7 Bom. L. R. 179 (184) Referred to. 20 Cal. 296 distinguished. A testator bequeathed his properties to a certain person but gave their enjoyment to another until the latter was paid a certain sum of money by the former. A suit brought by a purchaser from the former against the latter for possession of the properties on payment of the specified sum of money is not governed by any of the articles 123, 136 or 140 of the Limitation Act.

S. Varadachariar and *K. R. Rama Aiyar* for Appellant.

K. R. Rangaswami Iyengar for Respondent.

N. S.

Curgenven, J.
10th November, 1926.
S. A. No. 1330 of 1924.

Revenue Recovery Act, S. 59—Suit for recovery of cess under the Irrigation Cess Act—Suit for one relief barred—Court whether can refuse to decree the other reliefs which are not barred.

In a suit by a land-holder for a declaration that his lands were entitled to irrigation free of cess and for an injunction restraining the Secretary of State from levying the irrigation cess, *held* that S. 59 of the Revenue Recovery Act would apply if the collection of the cess was effected through the use of the coercive processes under the Act. 46 M. 488 referred to.

Where a Plaintiff asks for more than one relief in respect of a cause of action and one of such reliefs is barred by limitation, the Court cannot refuse to give him the other reliefs if they are in time.

B. Jagannada Doss for Appellant.

The Government Pleader for Respondent.

N. S.

Krishnan and Odgers, JJ.
11th November, 1926.
O. S. A. No. 76 of 1925.

Contract Act, Ss. 211 and 214—Commission agent directed to sell goods at a particular place—Whether can sell them at another place, apart from special usage.

A commission agent who consigns goods on behalf of local merchants to foreign markets to have them sold through his agents in those places has no general authority, in the absence of specific instructions or special usage, to re-ship the goods from the place to which it was originally consigned to some other place and have them sold there.

K. S. Krishnaswami Iyengar and *N. Srinivasa Iyengar* for Appellant.

K. S. Rajagopala Iyengar for Respondent.

N. S.

The Chief Justice and Sundaram Chetty, J.
12th November, 1926.
A. S. No. 134 of 1922.

Hindu Law—Partition—Suit for, by minor co-parcener—Consent decree—Date from which account should be taken.

The doctrine that a unilateral declaration of intention to separate expressed in the plaint in a partition suit will effect a severance in status has no application in the case of a partition suit instituted by a minor co-parcener, as the guardian's declaration of intention would not be a substitute for the minor's intention and the Court would decree parti ion only if it would be beneficial to him. 41 M. 442 referred to. But where the Court passes a preliminary decree for partition in a suit by minor, it must be deemed to have effected a partition as on the date of the institution of the suit and consequently the severance in status

would relate back to the date of the institution of the suit and accounts must be taken on this basis. The fact that the preliminary decree is a consent decree does not make any difference. 48. M. 465 referred to.

S. Varadachariar for Appellant.

S. Panchapegasa Sastri for Respondent.

N. S.

Sundaram Chetty, J.
12th November, 1926.
C. R. P. Nos. 830 and 915 of 1926.

Madras Local Boards Act, S. 55, *Clause* (2), *Sub-clause* (5), *Rr.* 5 *and* 11—*Rejection of the nomination paper of a candidate—Suit for declaration that he was validly nominated—Decree—Subsequent inclusion of name in the ballot paper and holding of the election the next day—Validity of the election—Decision whether* Res judicata *in a subsequent objection petition filed by an unsuccessful candidate—S.* 11—"*Unless expressly provided*"—*Meaning of.*

Where the nomination paper of a candidate who stood for election was rejected as invalid and the candidate filed a suit for a declaration that he was a validly nominated candidate and obtained a decree, and subsequently his name was included in the ballot paper and the election was held the next day, *held* that the decree related back to the date when the nomination list was published and the candidate's name must be deemed to have been included in the published list of valid nominations and consequently the election does not infringe the provisions of R. 5 (*a*) of the Rules published under the Madras Local Boards Act.

Held also that the Judgment in the candidate's suit would not operate as *res judicata* in a subsequent election objection petition filed by an unsuccessful candidate in the election, as the latter was not a party to the previous suit.

Where a person is elected as a member in respect of a vacancy which is to occur in future, he must be considered to be a member only as and from the date when the vacancy would occur and not when his name is published on the Notice Board before the date of the vacancy. The words unless expressly provided in S. 11 of the Act must be so construed as to make the newly elected member entitled to hold office only from the commencement of the vacancy.

T. Rangachariar and *A. Swaminatha Iyer* for Petitioner.

K. V. Krishnaswami Iyer, Watrap Subramania Iyer and *C. A. Seshagiri Sastri* for Respondent.

N. S.

Krishnan and Venkatasubba Rao, JJ.
12th November, 1926.
A. S. No. 435 of 1922.

Minor—Decree against—Execution—Guardian ad litem *refusing notice of execution proceedings, but not removed by order of Court—Minor whether properly represented.*

A decree was obtained against a minor represented by a guardian *ad litem*. The guardian *ad litem* refused to receive notice of sale proclamation and to act on behalf of the minor in subsequent proceed-

ings in execution of the decree. But the Court did not pass an order removing him from guardianship.

Held, that the guardian *ad litem* continued to represent the minor until he was removed by order of Court. 94 I. C. 352 and C. M. A. 488 of 1920 followed.

T. Rangachariar and *V. N. Venkatavaradachariar* for Appellant.

T. R. Ramachandra Aiyar and *A. V. Visvanatha Sastri* for Respondent.

N. S.

The Chief Justice, Krishnan and Curgenven, JJ.
12th November, 1926.

S. A. No. 1269 of 1923.

Hindu Law—Partition suit against father—Debts incurred by father for purposes not binding on the family—Whether father's share primarily liable.

There is no authority for saying that, in a partition suit against a Hindu father, the debts incurred by the father for purposes not binding on the joint family should in the first instance be directed to be paid out of the properties set apart for the father's share and the properties set apart for the son's shares should be made liable for the same only if the father's share is insufficient to pay the debts in full.

A. Krishnaswami Iyer and *B. Somayya* for Appellant.

K. Krishnasami Aiyengar for Respondent.

N. S.

Sundaram Chetti, J.
12th November, 1926.

C. R. P. No. 829 of 1926.

Civil Procedure Code, O. 11, R. 14—Order for production of documents without a prior order for discovery—Legality of.

No order for production of documents by a party ought to be passed in the first instance without complying with the procedure prescribed under the earlier Rules of O. 11. There must first be an order for discovery under R 12 and an opportunity given to the party to state his case in respect of the documents he has disclosed. Then only order for production should be passed.

T. Rangachariar and *V. N. Venkatavaradachariar* for Petitioner.

T. S. Ramasami Iyer and *S. Panchapegasa Sastri* for Respondent.

N. S.

Waller and Madhavan Nair, JJ.
15th November, 1926.

C. M. A. Nos. 228 and 229 of 1925.

Insolvency—Joint Hindu family—Father adjudicated as insolvent—Shares of minor sons whether vest in the Official Receiver—Power to dispose of minor sons' share—Right of official Receiver to exercise,

Where under the Provincial Insolvency Act, the father, and the major son were adjudicated insolvents and the undivided minor sons' shares were devoted to be vested in the Official Receiver on the ground that the debt was one incurred for joint family business.

Held, that the shares of the minor sons did not so vest and the lower court's order should be modified by reserving the right of the father to dispose of the shares of the minor sons to the Official Receiver. 51 M. L. J. 269 followed.

A. Ramachandra Iyer and *T. D. Srinivasachari* for Appellants.

T. M. Krishnaswami Iyer and *B. C. Seshachella Iyer* for Respondents.

N. S.

Venkatasubba Rao, J.
15th November, 1926. } T. O. S. 10 of 1926.

Hindu Law—Inheritance—Unchaste widow, when becomes degraded woman—Stridhan of degraded woman—Succession to.

Where a Hindu married woman lived after her husband's death in a continued state of unchastity, she is not thereby to be regarded as a degraded woman for purposes of successsion under the Hindu Law. 31 M. 100 followed.

Expulsion from caste is necessary for the unchaste widow to become degraded. The heirs to the stridhanam property of a degraded woman dying without issue take according to the ordinary rules of succession and her husband's brother is a nearer heir than her maternal uncle unchastity does not destroy either the tie of blood relationship or the tie of marriage. 23 M. 171, 40 C. 650 and 38 M. 1144, referred to.

S. Duraisami Aiyar for Plaintiff.

N. Sivaramakrishna Aiyar for Respondent.

N. S.

Jackson, J.
15th November, 1926. } S. A. No. 661 of 1924.

Civil Procedure Code, S. 11—Adverse finding—Res judicata—*Appeal.*

Where a decree is passed in favour of a party to a suit but a finding adverse to him is given on another issue in the suit, the party can appeal against the adverse finding. 47 M. 487 and 1926 Mad. 974 referred to.

The question of appealability is not material when considering the question whether the finding on the issue operates as *res judicata* in a subsequent suit between the parties. Where the parties raise an issue, it must be held to have been directly in issue though it might have been unnecessarily framed. The real point for decision is whether the issue was substantialy in issue or incidentally in issue, and not whether the issue was necessary or not. 11 C. 301, 48 C. 466 and 51 C. 631 considered.

K. S. Jayarama Aiyar for Appellant.

P. R. Srinivasan for Respondent.

N. S.

Ramesam, J.
16th November, 1926.

S. A. No. 462 of 1924.

Limitation Act, Arts. 127 and 144—Hindu co-parcener—Alienee—Adverse possession.

The proposition that as between co-parceners there can be no adverse possession except on proof of ouster has no application as between an alienee from a co-parcener and the other co-parceners.

Although a co-parcener dealing with more than his share is incompetent to pass a higher title than he has, there is nothing in law to prevent the alienee from prescribing for a good title by adverse possession.

The article of the Indian Limitation Act applicable to such a case is article 144 and not 127. 12 Weir 292, 42 M. L. J. 364, followed. 27 M. L. J. 600 dissented from.

Ch. Raghava Rao for Appellant.

A. Venkatachellam and *B. Satyanarayana* for Respondents.

N. S.

The Chief Justice and Srinivasa Aiyangar, J.
16th November, 1926.

L. P. A. No. 161 of 1925.

Hindu Law—Limited owner—Alienation not for legal necessity but with consent of next reversioner—Suit by that reversioner to recover possession of the properties alienated after the death of the limited owner—Estoppel.

Where the plaintiff sued to recover possession of the properties alienated by his mother on the ground that the alienation was not for any legal necessity. But he had himself given his consent to that alienation. The deed of alienation recited the purpose for which the alienation was made so that the alienee was fixed with knowledge of that purpose and that purpose was not in law such as would amount to legal necessity.

Held that, whether the purpose would amount to legal necessity or not, the plaintiff who had given his consent to the alienation was estopped from questioning the rights of the alienee.

S. Varadachariar and *A. Visvanatha Iyer* for Appellant.

V. C. Viraraghavan for *K. Bhasyam Aiyangar* for Respondent.

N. S.

Curgenven, J.
16th November, 1926.

S. A. No. 659 of 1925.

Registration Act, Ss. 17 and 49—Partition share lists—Unregistered—Admissibility—Re-opening of partition—Grounds for—Award of Jyeshtabhagham whether a ground.

Where, in a suit for partition, the Defendants pleaded that a partition had been made and put in evidence unregistered Karaiolais or share lists signed by all the parties and only attested,

Held, that the partition lists do not contain operative words of division of status and are admissible in evidence of an actual partition by metes and bounds, without registration. 19 L. W. 494 (Foll.) 30 M. L. J. 404 (Distinguished.)

Held, also that a partition cannot be re-opened except in cases of fraud or misrepresentation, on the ground that the values of the shares allotted to the members are unequal and that a Jyeshtabhagham was given to the eldest member of the family. Gour's Hindu Law, p. 679 (referred to) 39 M. L. J. 382 (F. B.) (Distinguished.)

K. Balasubramaniya Iyer for Appellant.

K. Bhashyam Iyengar for Respondents.

N. S.

Jackson, J.
16th November, 1926. } S. A. No. 713 of 1924.

Contract Act, S. 23—Opposed to public policy—Hypothecation bond—Agreement to render service in lieu of interest—Stipulation to pay interest at exorbitant rate in default of rendering service—Bond whether enforceable.

Where two persons executed a hypothecation bond and one of them agreed to render service in lieu of interest and also agreed to receive wages at a certain rate and in default of service, it was agreed that the executants should pay interest at a rate which amounted to Rs. 175 per cent. per annum, and that executant left off service for one year.

Held, that the bond was opposed to public policy and so was not enforceable.

Held also that the money paid under the bond could not be recovered.

Quaere.—Whether such a bond is a slavery bond? 42 Cal. 247 and 27 C. L. J. 459 considered.

T. D. Srinivasachri for Appellant.

S. *Ranganatha Iyer* for Respondent.

N. S.

Curgenven, J.
16th November, 1926. } S. A. No. 646 of 1924.

Hindu Law—Widow—Alienation for no consideration—Subsequent surrender to the next reversioner—Alienee whether entitled to hold the properties during the widow's life-time.

Where a Hindu widow alienated her husband's properties for no consideration and subsequently surrendered all her rights in favour of the next reversioner and the latter brought a suit against the alienee for recovery of the properties alienated to him by the widow,

Held that the alienee was entitled to hold the properties during the life-time of the widow and the fact that the widow surrendered all her rights to the plaintiff would not entitle him to recover possession of the properties so long as the widow was alive. 39 M. 1035, 41 M. 75 and 48 M. 903 referred to.

K. V. Krishnasami Aiyar and *N. Swaminathan* for Appellant.

B. Sitaram Rao and *K. V. Sesha Aiyangar* for Respondent.

N. S.

Ramesam, J.
16th November, 1926. } S. A. Nos. 336 and 337 of 1924.

Inam—Akaram service inam—Post settlement inam—Resumption—Right of Zamindar to resume—Presumption—Grant whether burdened with service or in lieu of wages.

In the case of a post-settlement inam granted for Akaram 'service, there is a presumption that the zamindar can resume it and the onus of proving that it is not resumable is upon the grantee. 1911 (2) M. W. N. 406 : 8 M. L. T. 82, Relied on. 28 B. 305, distinguished. 30 M. L. J. 132 Q. B, referred to. Observations in 50 M. L. J, 251, not approved.

S. Venkatesa Aiyangar for Appellant.

V. Govindarajachari for Respondent.

N. S.

Ramesam, J.
17th November, 1926. } S. A. No. 1601 of 1923 and C. R. P. No. 867 of 1923.

Civil Procedure Code, O. 41, *R.* 27*—Failure to record reasons—Mere irregularity—Waiver.*

The failure of the appellant court to record reasons for taking additional evidence as prescribed by O. 41, R. 27 is a mere irregularity which does not constitute a ground for interference in second appeal or in revision except on proof of prejudice to the party complaining of the irregularity.

The irregularity is one curable by consent of parties and capable of waiver. 1 L. W. 77 distinguished.

Ch. Raghava Rao for Appellants.

B. Somayya for Respondents.

N. S.

Beasley, J.
17th November, 1926. } O. P. No. 62 of 1922.

Companies Act, Ss. 186 *and* 229*—Limited Company—Liquidator's call—Decree against company in favour of some of the directors—Right to set off, whether exists—Civil Procedure Code, S.* 141.

7 out of 10 directors of a limited company obtained a decree against the company. The company went into liquidation and the Liquidator called for contributions. The 7 directors wanted to set off the decree amount against the Liquidator's call.

Held, such a set off is not allowable under the Companies Act. S. 186 (2) of the Companies Act allows such a set off only in the case of *unlimited* companies. Buckly on Companies (1924 Edition), p. 396, followed. Nor does S. 229 of the Companies Act allow such a set off. S. 141 of the Civil Procedure Code also cannot be invoked ; for it applies only to suits and not to applications taken by the Liquidator calling for contributions under the Companies Act.

N R C

V. Narasimha Aiyangar for Liquidator.

N. Sivaramakrishna Aiyar for Directors.

N. S.

Wallace and Madhavan Nair, JJ.
17th November, 1926.

C. M. A. No. 374 of 1924.

Court-fees Act, S. 7 (5)—Madras Civil Courts Act, S. 14—Suit for declaration as to facture and validity of adoption—Land indirectly affected—Determination of forum.

A suit for a declaration as to the factum and validity of an adoption by which title to land may be indirectly affected is not a suit of which the subject matter is land within Section 14 of the Madras Civil Courts Act, and consequently the computation prescribed by Section 7, Clause V of the Court-fees Act, does not determine the forum for purposes of jurisdiction. 13 I. C. 903, followed.

The market value of the land in question is in such a case the true test. 49 M. L. J. 309, followed.

The proposition laid down in 12 Mad. 223 that a suit for a declaration cannot stand for purposes of jurisdiction on a higher footing than that of a suit for possession not approved.

The plaintiff is entitled to put his own valuation however arbitrary in all cases in which the value of the relief is not assessable in terms of money such as in a suit for restitution of conjugal rights. In all cases in which the relief has relation to subject matter assessable in terms of money, the market value is the true test. 34 Cal. 352, 28 All. 545, 56 I. C. 762, 18. L. W. 399, 43 Bom. 507, 6 Mad. 192, 30 Mad. 18, Referred to.

Ch. Raghava Rao for Appellant.

P. Kameswara Rao and *B. Somayya* for Respondents.

N. S.

Wallace and Madhavan Nair, JJ.
17th November, 1926.

L. P. A. No. 328 of 1926.

Letters Patent Clause 15—"Judgment"—Order staying execution of a decree.

An order for stay of execution of a decree is a "Judgment" within the meaning of clause 15 of the Letters Patent and an appeal lies from that order of a Single Judge of the High Court to a Bench of 2 Judges. 49 M. L. J. 25 P. C., referred to. 35 M. 1., followed.

T. Rangachari, V. N. Venkatavaradachari and *R. Gopalachari* for Appellant.

C. S. Venkatachari for Respondent.

N. S.

Waller, J.
17th November, 1926.

C. R. P. No. 1372 of 1925.

Civil Procedure Code, O. 23, R. 3—Compromise—Court passing decree in ignorance of the compromise—Jurisdiction of Court to record compromise subsequently.

A Court has got jurisdiction to record a compromise even though it has passed a decree in ignorance of the compromise petition filed on the same day.

K. V. Sesha Aiyangar for Petitioner.

V. Ramasami Aiyar for Respondent.

N. S.

Curgenven, J.
18th November, 1926. } S. A. No. 1549 of 1925.

Hindu Law—Reversioner—Suit by—Proof of title—Onus of proof—Necessity to prove absence of nearer reversioner.

Where a Hindu reversioner brings a suit for recovery of possession of the properties of the last male owner from the person in possession, the onus lies on him to prove not only that he is the reversioner but also to prove at least *prima facie* that there is no other nearer reversioner living. 12 M. I. A. 448, 23 A. 72 P. C., 23 C. W. N. 1048 and 40 M. 654, followed.

K. V. Krishasami Aiyar and *N. Swaminathan* for Appellant.

A. C. Samputh Aiyangar and *P. C. Parthasarathi Aiyangar* for Respondent.

N. S.

Curgenven, J.
18th November, 1926. } A. S. Nos. 25 and 417 of 1924.

Civil Procedure Code, O. 47, R. 1—Application for review—Whether can be filed in forma pauperis.

A petition for review of a decree in a suit or appeal which was filed after payment of Court-fees can be filed *in forma pauperis.*

K. Krishnasami Aiyangar for Petitioner.

N. S.

Krishnan and Odgers, JJ.
19th November, 1926. } A. S. No. 324 of 1925.

Transfer of Property Act, S. 53—Mortgage to one of the creditors by the debtor—No proof that debtor was in insolvent circumstances—Mortgage whether valid.

A debtor executed a deed of mortgage to one of his creditors for the amount due to him and as a result of this a number of his other creditors were defeated. There was no proof that the debtor was in insolvent circumstances.

Held, that it was only a preference of a creditor and in the absence of insolvency even a fraudulent preference of a creditor cannot be impeached. 43 C. 521 P. C., followed.

K. S. Desikan for Appellant.

R. Kuppusami Aiyar for *S. Muthiah Mudaliar* for Respondent.

N. S.

Kumarasami Sastri, and Reilly, JJ. 19th November, 1926. A. S. No. 325 of 1925.

Hindu Law—Joint Family—Site belonging to joint family—Superstructure built out of self-acquisitions of one of its members—Whether becomes part of the joint family properties.

It is a question of intention to be gathered from the circumstances of each case whether a member of a joint Hindu family can be said to have so dealt with his self-acquired property as to impress it with the character and incidents of joint family property. Where the sole surviving co-parcener in exclusive enjoyment of properties both ancestral and self-acquired raises a superstructure out of his self-acquisitions on the site admittedly belonging to the joint family, the presumption is that he intends to keep the building as his own separate property.

M. Patanjali Sastri for Appellant.

S. Varadachari and *R. Kesava Aiyangar* for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ. 23rd November, 1926. A. S. No. 272 of 1925.

Benami Transaction—Purchase in the name of minors represented by guardian by their paternal aunt—Purchase money paid by her and possession also retained by her—Effect—Doctrine of advancement.

Certain properties were purchased in the name of two minor brothers represented by their guardian by their paternal aunt. The latter paid the purchase money and herself was in possession of the properties till her death. In a partition between the two brothers when the paternal aunt was present, this property also was divided between the two brothers. Subsequently the paternal aunt executed a settlement deed, settling the properties on one of the brothers and certain other persons. The other brother brought a suit for half of the properties. The other brother contended that the purchase in the names of the brothers by the aunt was benami for her and the title remained in her so that the settlement by her was valid.

Held, that the source of purchase money and the possession were not the sole tests of the benami character of a transaction and the affection towards the boys, the motive for the purchase and the surrounding circumstances showed that the paternal aunt intended the purchase to be for the benefit of the minors. The doctrine of advancement was applicable. 33 C. 733, 5 Bom. L. R. 784 and 24 A. L. J. 458, referred to.

K. Bhasyam Aiyangar and *S. Panchanada Mudaliar* for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for Respondents.

N. S.

Kumaraswami Sastri and Reilly, JJ. *16th November*, 1926. — A. S. No. 192 of 1923.

Registration Act, S. 49—Partition Lists—Unregistered—Whether admissible in evidence—Division in status.

Unregistered partition Lists are admissible in evidence to prove a division in status, only they cannot be used to affect immoveable property. According to 43 Madras 244 an unregistered document can be used for a collateral purpose and if it is not against the principle of the Registration Act that an unregistered document can be used to show the nature of possession and adverse possession it is difficult to see how a document can be rejected for want of registration, if it is merely intended to show a division in status. It is doubtful if the decisions in 16 L. W. 784 and 87 I. C. 285 lay down good law. 46 M. 349 and 19 L. W. 494 followed. 43 M. 244 P. C. Applied.

B. Somayya and *E. Krishnamurthi* for Appellants.

A. C. Sampath Iyengar for Respondents.

N. S.

Srinivasa Iyengar, J. *17th November*, 1926. — C. R. P. No. 470 of 1926.

Civil Procedure Code, S. 115—Order allowing amendment of plaint—Interference in revision.

The propriety of an order allowing amendment of plaint is more properly a subject of attack in appeal against the decree that may be passed in the suit. The delay worry and expense caused by a trial wi'h an amended plaint is not a sufficient cause for interference in revision.

E. Krishnamurthi for Petitioner.

K. Rajah Iyer for Respondent.

N. S.

Waller, J. *17th November*, 1926. — S. A. No. 348 of 1924.

Endowment—Dedication to particular castes—Validity.

Dedication of a tank or well to the exclusive use of persons belonging to a particular caste or castes is not unknown to law and is perfectly valid.

In the absence of a written instrument evidencing such a limited dedication, it can be inferred from long and exclusive user. 1913 M. W. N. 247 : 18 I. C. 979 referred to.

K. Bhimasankaram for *B. Satyanarayana* for Appellants.

V. Govindarajachari for *A. Krishnaswami Iyer* for Respondents.

N. S.

Odgers and Jackson, JJ. *17th November*, 1926. — A. S. No. 197 of 1924.

Civil Procedure Code, S. 92—Head of Mutt—Whether a trustee.

The head of a mutt is not a trustee in the strict English sense of the term, though he is loosely called a trustee. But he is answerable as a trustee in respect of the administration of the mutt and the management of its properties. A suit can be brought under S. 92 for a scheme in respect of it. 27 M. 435, 40 M. 709 P. C. and 43 C. 707 considered.

K. Rajah Iyer and *V. Ramasamy Iyer* for Appellant.

T. R. Ramachandra Iyer and *N. A. Krishna Iyer* for Respondent.

N. S.

Curgenven, J.
17th November, 1926. } C. R. P. No. 697 of 1926.

Civil Procedure Code, S. 115—Order striking out one of the issues—Revision.

An order striking out an issue is not a "case" within the meaning of S. 115, Civil Procedure Code and consequently is not revisable by the High Court. 17 M. 410 : 43 A. 564, followed.

T. M. Krishnasami Aiyar and *T. S. Anantaraman* for Petitioner.

S. T. Srinivasagopalachari for Respondent.

N. S.

Krishnan and Odgers, JJ.
18th November, 1926. } A. S. No. 352 of 1925.

Land Acquisition Act—Landlord and Tenant—Apportionment—Sale of kudivaram by landlord reserving a small rent—Effect of.

Where an Inamdar executed a sale-deed of kudivaram right in a certain land for Rs. 150 reserving only a right to receive Rs. 4 a year, permanently and where without any Act of improvement by either the landlord or the tenant, a large amount was received for the land under the Land Acquisition Act.

Held that, in apportioning the amount as between the two persons, the document must be treated as a permanent lease and that the landlord is entitled to a share in the increase and that the compensation should be divided in the ratio of 80 to 150, taking the landlord's share at 80 (20 years purchase at Rs. 4 a year) 30 Cal 801 dissented from, 36 Mad. 395 followed.

T. V. Muthukrishna Iyer for Appellant.

K. Aravamuda Aiyengar for Respondent.

N. S.

Ramesam, J.
23rd November, 1926. } S. A. No. 528 of 1924.

Contract Act, S. 253 (10)—Partnership for an adventure—Death of partner—Dissolution by—If effected—Suit for accounts—By some of the heirs of a Mahomedan partner—Other heirs not parties—Non-joinder.

Though a partnership may be for a single adventure or undertaking, yet it is previously dissolved by the death of a partner, though the venture or undertaking be then incomplete.

Lindley, p. 153, Ss. 32 (*b*) and 33, Partnership Act, 1890 and 57 L. T. N. S. 53, referred to. The cause of action vesting on the death of a Mahomedan partner on his heirs (to sue for accounts) is single and indivisible, though as between themselves their shares may be several. A suit for accounts by some only of the heirs without making the others parties is not maintainable. 25 Mad. 26, appld. 36 I. C. 77, followed.

A. Krishnaswami Aiyar and *C. Rama Rao* for Appellants.

K. N Rajagopal Sastri (with *S. Varadachariar*) for Respondent.

N. S.

Curgenven, J.
23rd November, 1926. } C. R. P. No. 149 of 1926.

Civil Procedure Code, S. 115—*"Jurisdiction"—Meaning of—Erroneous decision on point of limitation—Revision.*

Where the lower Court erroneously decided that an application to set aside an award was out of time and in so deciding failed to deduct the time taken in obtaining a copy of the award as it ought to have done under S. 12 (4) of the Limitation Act, held that the order was however not revisable by the High Court under S. 115 of the Civil Procedure Code. 11 Cal. 6 P. C., 39 Cal. 473, 4 Pat. 800, 46 I. C. 176, 20 All. 78, 16 M. L. T. 478 and 19 M. L. T. 24, referred to and followed. 46 Mad. 938 and 44 Mad. 454, distinguished.

The term "jurisdiction" in S. 115 issued in the ordinary sense, that is "a jurisdiction, local pecuniary, personal or with reference to the subject-matter of the suit" and does not mean "the legal authority of a Court to do certain things namely to make a particular order in a case over which it has jurisdiction." 41 Cal. 323 referred to.

P. Somasundaram for the Petitioner.

V. Govindarajachari for the Respondent.

N. S.

Curgenven, J.
23rd November, 1926. } C. R. P. No. 217 of 1926.

Civil Procedure Code, S. 115—*Order allowing suit to be filed* in forma pauperis—*Revision.*

Where an application for leave to file a suit *in forma pauperis* was opposed by the defendant, but the Government pleader took time for counter affidavit and on the adjourned date reported that he did not oppose the application, held that there was no rule which would entitle the defendant to have a further adjournment of the case to produce evidence and he ought to have been ready on that date itself with evidence.

2. The order of the lower Court allowing the suit to be filed *in forma pauperis* without granting the adjournment is not open to revision under S. 115.

3. The principle laid down in 48 M. 700 under similar circumstances (an appeal from the Original Side) does not apply to revision under S. 115.

S. Ramaswami Iyer for Petitioner.

P. S. Narayanaswami Iyer and *P. S. Ramachandra Iyer* for Respondents.

N. S.

Kumarasami Sastri and Reilly, JJ.
23rd November, 1924. } A. S. No. 101 of 1923.

Hindu Law—Widow—Superstructure built with her funds on her husband's site—Whether accretions—Debt of widow borrowed for building purposes—Validity of.

Any superstructure newly built by a widow with funds of her own on a site belonging to the last male holder goes with the estate and cannot be claimed as her separate property. 31 Mad. 321 and 6 C. L. R. 66 followed. A Hindu widow cannot borrow for building purposes so as to bind the Reversioner. 35 Mad. 560, referred to.

C. V. Ananthakrishna Iyer and *S. Nataraja Nadar* for Appellants.

B. Sitarama Rao and *S. R. Muthusamy Iyer* for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ.
23rd November, 1926. } S. A. No. 1244 of 1923.

Civil Procedure Code, S. 92—Religious Endowment Act, S. 14—Suit by 2 worshippers for mandatory injunction to compel the trustees to receive a certain sum for putting up a pandal in a shrine and to put up the pandal—Necessity for sanction.

Two worshippers of a temple instituted a suit against the trustees of a temple for a mandatory injunction to compel the trustees to receive from them a certain sum for the cost of putting up a pandal in the temple and to put up the pandal.

Held, that the suit as framed was not maintainable without the sanction of the Advocate-General under S. 92, Civil Procedure Code, or of the Court under the Religious Endowment Act, as the plaintiffs did not allege any special and personal right of their own over and above the right they enjoyed as members of the worshipping public such as a hereditary right. 6 M. 151 : 23 M. 28 : 15 M. L. J. 458 : 4 L. W. 562 : 45 M. 113 Q. B. referred to.

C. Narasimhachari for Appellant.

T. R. Ramachandra Aiyar and *N. Chandrasekhara Aiyar* for Respondent.

N. S.

Ramesam and Wallace, JJ.
24th November, 1926. } S. A. No. 1886 of 1923.

Civil Procedure Code, S. 73—Where assets become realised in execution—Perishable property attached before judgment and

sold—Subsequent decree and execution—Order on the petition, necessity of.

X and Y two creditors obtained attachment before judgment of certain movable property which was sold as it was perishable and the sale proceeds were deposited to the credit of X's suit. X obtained decree afterwards and put in an execution petition. But after X's decree but prior to the order on execution petition Y also obtained decree and put in an execution petition in his own suit. The Lower Courts allowed X to draw the whole amount as X was the first to obtain the decree and put in his execution application.

Held, in second appeal that the putting in of an execution petition by itself will not make the assets as realised in execution of X's decree and that till an order was made on that it cannot be deemed to be so. The test laid down by Wallace, J. in 46 Mad. 506 L. P. A. applied.

S. Rangaswami Aiyengar for Appellant.

R. Visvanathan and *A. Srinivasan* for Respondent.

N. S.

Ramesam and Wallace, JJ.
24th November, 1926.

S. A. No. 1118 of 1923.

Contract Act, S. 74—Penalty—Compound interest at a higher rate—Compensation.

Where a mortgage bond stipulated for a higher rate of compound interest in case of default in payment of principal and interest on the due date, the stipulation is by way of penalty and can be relieved against. But the Court must award some compensation over and above the original rate.

A. N. Krishna Aiyengar for Appellant.

V. Ramaswami Aiyar for Respondent.

N. S.

Kumaraswami Sastri and Reilly, JJ.
25th November, 1926.

A. S. No. 1 of 1926.

Civil Procedure Code, O. 1, R. 10 (5)—Limitation Act, S. 22—Petition to implead a party as defendant—Order impleading him as party—Whether relates back to the date of the application.

A petition was put in to implead a person as a party to a suit and it was ordered. But on review this order was cancelled and the petition was dismissed. Against the order granting the review a Civil Revision Petition was filed in the High Court and it was allowed with the result that the lower Court was directed to add him as a party and proceed with the suit. The lower Court held that the suit as against this added defendant must be taken to have been instituted only on the date when the summons was served upon him and so dismissed the suit as it was barred by limitation on that date. The plaintiff preferred an appeal.

Held, that the order passed by the High Court on the C. R. P. must be taken to have been the order passed by the Lower Court

on the petition and that it would relate back to the date of presentation of the petition and that as the claim was not barred on that date the suit was not barred as against him. 17 B. 29 followed. 33 M. 115 referred. 21 L. W. 125 and 1926 M. W. N. 592 P. C. distinguished.

K. P. Raman Menon for Appellant.

T. R. Ramachandra Aiyar and *T. Ramachandra Rao* for Respondent.

N. S.

Krishnan, J.
26th November, 1926.

C. M. S. A. No. 70 of 1925 and C. R. P. No. 851 of 1925.

Civil Procedure Code, S. 104 and O. 43, R. (1) (j)—Order under O. 21, R. 89—Appeal—Second appeal or Revision to the High Court—Decree-holder privately purchasing properties of the judgment-debtor but not entering up satisfaction—Court sale—Purchase by stranger at the auction—Application by decree-holder under O. 21, R. 89 to set aside the Court sale—Estoppel.

The decree-holder in a mortgage suit applied for execution. Before the sale in execution, the decree-holder purchased the properties privately but did not bring it to the notice of the Court. The execution proceedings were not stopped and the properties were sold in Court auction and purchased by a stranger. The decree-holder subsequently put in a petition under O. 21, R. 89 to set aside the Court sale. The District Munsif set it aside but on appeal the District Judge reversed it and dismissed the petition. Against this a second appeal and a revision petition were filed.

Held, (1) that second appeal did not lie, as S. 104 (2) read with O. 43, R. 1, Cl. (j) showed that the order on the appeal was final.

(2) That a revision would lie 44 M. 554 Q. B. followed.

(3) The decree-holder was not estopped from applying under O. 21, R. 89 simply because he was careless in not bringing the fact of the satisfaction of his decree to the notice of the Court. 2 P. 720 followed, 15 L. W. 272 distinguished.

W. Kothandaramiah for Appellant.

V. S. Narasimhachari for Respondent.

N. S.

Waller and Madhavan Nair, JJ.
26th November, 1926.

L. P. A. No. 210 of 1925.

Limitation Act, Art. 144—*Adverse possession—Usufructuary mortgage of service inam lands—Subsequent sale of the same lands—Subsequent enfranchisement in favour of the office-holder—Suit by office-holder for recovery of the lands—Limitation—Plaintiff whether bound consideration of the sale amount to the defendant.*

The holder of the office of Karnam gave a usufructuary mortgage of the service Inam lands in 1907 for Rs. 700 to the father of defendants and put the defendants in possession. In 1910 a sale-deed was executed for the same lands in favour of defendant's father for Rs. 1,500 comprising of Rs. 700 the mortgage amount and Rs. 800 cash. The lands were enfranchised in 1911 in favour of the office-holder. The office-holder filed a suit in 1920 for recovering the lands from the defendants.

Held :—As the mortgage of 1907 was discharged by the sale of 1910 adverse possession cannot be counted from 1907 and the adverse possession of defendants was not perfected within 12 years from the date of sale.

(2) As the transaction was void in law plaintiff is bound to refund to the defendants Rs. 1,500. 50 L. A. 69 followed.

K. Bhimasankaram for Petitioner.

B. Satyanarayana for Appellant.

Y. Suryanarayana for Respondents.

N. S.

Odgers, J.
26th November, 1926.

S. A. No. 1043 of 1923.

Madras Estates Land Act, S. 3 (4), *Rent Sale of Enfranchised Reddi Inam for arrears of Jodi payable to Zemindar—Whether passes title to purchaser.*

A Reddi inam was enfranchised by Government and ayan patta issued to the inamdar. The inam had been excluded from the assets of the Zemindari at the time of settling the peishcust. The inam was sold for arrears of Jodi due to the Zemindar under the provisions of the Estates Land Act.

Held, that Jodi was not "rent" within the meaning of the Estates Land Act, that the mere payment of Jodi to the Zemindar did not establish the relation of land-holder and ryot between the Zemindar and inamdar and that the rent sale was therefore invalid and passed no title to the purchaser.

E. Krishnamurthi for Appellant.

N. Chandrasekhara Aiyar for Respondent.

N. S.

N R C

Ramesam and Wallace, JJ. *29th November*, 1926.	S. A. No. 243 of 1924.

Limitation Act, Ss. 9 *and* 14—*Suit on promissory note—Previous suit for declaration that pronote was unenforceable and for its cancellation—Cause of action whether suspended.*

The maker of a promissory note instituted a suit against the payee for a declaration that the promissory was unenforceable as it was brought about by fraud undue influence and for its cancellation. The suit was dismissed finally by the appellate court. Subsequently the payee of the note instituted a suit to recover the amount due on the note. He wanted to deduct the time taken during the pendency of the proceedings in the prior suit. *Held* that the time cannot be suspended and that apart from specific Sections of the Limitation Act allowing exemptions no other exemption could be claimed. 43 C. 660 P. C. followed.

V. Suryanarayana for Appellant.

K. Venkatrama Raju for Respondent.

N. S.

Chief Justice and Srinivasa Iyer, JJ. *29th November*, 1926.	Crl. Rev. Case. No. 556 of 1926.

Madras Local Boards Act (XIV of 1920)—*Sch. VII (K) and Ss.* 193 *and* 207—*Stall where coffee and sweets are sold whether a coffee-house or a restaurant—Necessity for license.*

A stall where coffee is prepared and sold together with sweets, is not a coffee-house or a restaurant within the meaning of Sch. VII, Cl. (K) of the Madras Local Boards Act and it is unnecessary to obtain a license for the same under S. 193 of the Local Boards Act and the conviction of the accused for keeping such a stall without a license, under S. 207 of the Local Boards Act is illegal and ought to be set aside.

P. S. Narayanaswami Iyer for Petitioner.

The Acting Public Prosecutor R. N. Aiyengar for Crown.

N. S.

Curgenven, J. *30th November*, 1926.	S. A. No. 722 of 1924.

Transfer of Property Act, S. 53—*Suit under—Whether should be a representative suit—Point not raised in the lower courts—Whether can be raised in second appeal.*

The plaintiffs mortgagees from the first defendant instituted a suit for setting aside a sale-deed executed by him to the second defendant a few days prior to his mortgage on the ground that the sale was not supported by consideration and was in fraud of creditors. The second defendant, *inter alia*, pleaded that the suit brought individually in the plaintiff's name was not maintainable, and that the suit must be framed as one in a representative capacity on behalf of all the creditors. The trial Court over-ruled this plea and on the merits decreed the suit. On an appeal by the second defendant, the plea of maintainability of

the suit was not taken and the Appellate Court also dismissed the appeal. *Held* that the point as regards the maintainability of the suit ought not to be allowed to be raised in second appeal, the same having been waived before the lower appellate Court; though questions of law or of Jurisdiction might be taken for the first time in second appeal, the present case would not come within that rule, as the rule requiring the suit to be brought in a representative capacity is one for the protection of the interest of the alienee who ought not to be harassed by a number of suits instituted by individual creditors.

A representative suit should conform to the provisions of Order 1, Rule 8, Civil Procedure Code. A mere averment in the plaint by the plaintiff that he and other creditors are sought to be defrauded will not do.

K. Kameswara Rao for Appellant.

The Hon'ble Mr. V. Ramadas for Respondent.

N. S.

Waller and Madhavan Nair, JJ. *1st December*, 1926. — C. N. A. No. 419 of 1924 and S. A. No. 742 of 1925.

Civil Procedure Code (Act V of 1908)—O. 22, Rr. 9 and 11—Abatement—One of several joint decree-holders not brought on record—Whole appeal abates.

Where after the appeal was preferred one of the respondents-decree-holders died and his legal representative was not brought on record and a decree was passed by the appellate court. *Held* that as the appeal had abated as against one of the joint-decree-holders, the whole appeal would abate.

G. Ramakrishna Aiyar, Vakil for Appellant.

B. Somayya, Vakil for Respondent.

N. S.

Waller and Madhavan Nair, JJ. *1st December*, 1926. — L. P. A. No. 140 of 1925.

Inam—Grant of, in favour of the grantee, his assigns and representatives—Grantee dead before the inam deed drawn up—Right of legal representative.

One Venkataraju, the Karnam of a village was enjoying a portion of service Inam lands and died in February 1906. Three Inam title-deeds for the service lands were signed by the Inam Commissioner in June 1906 and 1907, in favour of Venkataraju and 6 others. The enfranchisement took effect from 1911. The title-deeds conferred title to "you your representatives and assigns." A suit was filed by Venkataraju's heirs to recover the service Inam lands enjoyed by him in his life time.

Held:—The title-deeds do not confer any right on Venkataraju as he died long before they were signed by the Inam Commissioner.

(2) A grant to "you your representatives and assigns" means an absolute estate to you but does not confer a right on the representatives and assigns as they are words of limitation and not of purchase. 45 All. 595 P. C.

(3) Board Standing Order 52, Cl. (2) applies to cases where the grantee was alive at the date of signing of the title-deed by the Inam Commissioner but died before the date of delivery of title deed to him and has no application to the facts of the present case.

The decision of Phillips, J. in section 1574/22, reported at 49 M. L. J. 547, reversed.

Y. Suryanarayana for Appellant.

C. Rama Rao for Respondent.

N. S.

Devadoss, J.
1st December, 1926. } S. A. No. 295 of 1924.

Evidence Act (I of 1872)—S. 92—Property purchased by father in the joint names of two sons—Document silent as to how the property is to be taken by the vendees—Evidence as to father's intention—Admissibility as between the co-vendees.

Where a father purchased properties in the joint names of his two minor children and for their benefit with the intention that they should separately take specific properties and where the sale-deed was silent as to how the property should be taken, evidence is admissible to show, in a dispute between the vendees, the father's intention by proof of his acts and conduct both prior and subsequent to the registration of the deed. Sec. 92 of the Evidence Act is no bar to the reception of such evidence as between the co-vendees, since it applies only between the parties who, on one side and on the other, come together to make the contract. I. L. R. 10 All. 421 followed.

G. Lakshmanna and *K. Kameswara Rao* for Appellant.

S. Varadachariar for Respondent.

N. S.

Wallace, J.
2nd December, 1926. } C. R. P. No. 236 of 1926.

Civil Procedure Code, O. 5, R. 20 and O. 9, R. 13 and S. 115—Defendant served by substituted service—Application to set aside the ex parte *decree—Court whether can go into the sufficiency or validity of substituted service—Limitation—Limitation Act, Art. 164—Revision.*

In an application to set aside the *ex parte* decree passed against a defendant who was served by substituted service and was *ex parte* at the time of hearing, the court cannot go into the validity or sufficiency of the substituted service. Substituted service is due service for the purpose of Article 164 of the Limitation Act.

N. Sivaramakrishna Aiyar for Petitioner.

A. Krishnasami Aiyar for Respondent.

N. S.

Kumarasami Sastri and Reilly, JJ.
3rd December, 1926. } A. S. Nos. 155 and 208 of 1923.

Hindu Law—Adoption by widow—Consent by son—Suit by reversioner to set aside adoption—Limitation—Limitation Act, Art. 118.

The following questions were referred to a Full Bench :—

(1) Whether an adoption made by a Hindu widow with the authority of her son given under his will is valid if it was not objected to by the then nearest reversioner.

(2) Where the immediate reversioner at the time of the adoption was a major and died before a suit for a declaration that the adoption was not valid was barred, what is the period of limitation for a suit by the next reversioner who was a minor on the date of the adoption for the same relief.

S. Varadachariar for Appellant.

A. Krishnasami Aiyar for Respondent.

N. S.

Ramesam and Madhavan Nair, JJ. *3rd December*, 1926. } C. M. A. No. 375 of 1925.

Provincial Insolvency Act (1920), *S.* 10—*Dismissal of prior application for insolvency by debtor for default—Whether bars subsequent application—Civil Procedure Code, O.* 9, *R.* 9—*Whether applicable.*

A dismissal of a prior insolvency application by a debtor for default does not bar a subsequent application by him for adjudication as an insolvent. Followed.

E. Krishnamurthi for *B. Somayya* for Appellant.

R. Srinivasa Aiyangar for Respondent.

N. S.

Krishnan and Odgers, JJ. *6th December*, 1926. } A. S. No. 42 of 1925.

Hindu Law—Joint family—Illegitimate daughter of a deceased member of the family—Right to claim maintenance from the joint family.

Though illegitimate sons are entitled under Hindu law to claim maintenance from the surviving co-parceners out of the joint family properties, illegitimate daughters are not so entitled, as they cannot be regarded as members of their father's family. Case law on the subject reviewed.

A. Krishnasami Aiyar for Appellant.

K. S. Krishnasami Aiyangar for Respondent.

N. S.

Devadoss, J. *7th December*, 1926. } S. A. No. 449 of 1924.

Limitation Act, Art. 61—*Agreement by lessee to assign lease—Failure to execute deed—Suit for specific performance—Decree—Execution of assignment deed—Suit by for recovery of amounts paid to lessor—Limitation.*

A lessee entered into an agreement to transfer the lease obtained by him in favour of another person and placed him in possession. But

he failed to execute a duly registered deed of assignment and a suit for specific performance was brought and decreed in the first court and confirmed by the High Court in second appeal: The lessee executed the assignment deed pursuant to the decree and instituted the present suit for recovery of the amounts paid by him to his original lessors by way of Poruppu and other dues, during the period of the litigation,

Held, (1) the suit was barred so far as the recover of amounts paid more than 3 years prior to the suit was concerned,

(2) that the cause of action cannot be said to arise from the execution of the deed of assignment,

(3) that the proper article applicable was article 61 and the cause of action accrued on the date of the decree of the first court directing specific performance.

S. *Varadachariar* and *G. Rajagopalan* for Appellants.

K. Rajah Iyer and *V. Ramaswami Iyer* for Respondents.

N. S.

Waller, J.
7th December, 1926. } C. C. A. No. 65 of 1925.

Master and servant—Government servant on leave under the Rules—Acceptance of private service contrary to the Rules in anticipation of getting permission—Subsequent application for permission—Refusal of permission—Continuance in private service for one year afterwards—Subsequent dismissal from service —Right of Government to recover the leave allowance drawn by the servant.

On 3rd January 1921 a Government servant who was on leave took up private service without getting the permission of the Government as per the Government Rules but in anticipation of getting permission. He sent his application for permission on 16th January 1921 but the same was refused on 10th March 1921. But he continued in private service even after that and while so continuing drew his leave allowance till 31st July 1922. The Government called for an explanation in August 1922 and dismissed him from service on 26th October 1922. The Government brought a suit to recover from him the leave allowance drawn by him from 3rd January 1921 to 31st July 1922 on the ground that it was paid to him under a mistake of fact.

Held, (1) as Rule 52 of the Government Rules said that the "pay and allowances of an officer dismissed from service cease from the date of dismissal," the allowances drawn by the officer before the date of dismissal could not be recovered,

(2) the amount could not be recovered under the general law of master and servant as it was not paid under any mistake of fact. 1904 (1) Ch. 276 distinquished.

K. V. Krishnasami Aiyar and *T. K. Rangasami Aiyar* for Appellant.

The Government Pleader for Respondent.

N. S.

Madhavan Nair, J.
7th December, 1926.

C. R. P. No. 753 of 1926.

*Civil Procedure Code, O. 9, R. 13—Defendant served by substituted service under O. 5, R. 20—*Ex parte *decree—Application to set aside* ex parte *decree—Limitation Act, Art. 164—"Summons duly served"—Meaning of.*

Where a defendant is served by substituted service, it cannot be said that the summons is not duly served within the meaning of Article 164 of the Limitation Act. Consequently the period of limitation for setting aside the *ex parte* decree in such a case is 30 days from the date of the decree and not from the date when the defendant had knowledge of the decree. 7 L. L. J. 448 followed.

In an application to set aside an *ex parte* decree, the onus of proving that the summons was not duly served is upon the defendant and if he does not adduce any evidence the application must be dismissed.

N. Swaminathan for Petitioner.

K. G. Srinivasan for Respondent.

N. S.

The Chief Justice and
Srinivasa Aiyangar, J.
8th December, 1926.

O. S. A. No. 24 of 1926.

Presidency Towns Insolvency Act, S. 116 (2)—"Order having been duly made"—Meaning of—Order of adjudication based on decision with regard to a particular act of insolvency—Whether a judgment in rem *so as to bind persons who were not parties to the order.*

Though an order of adjudication is based on a decision with regard to a particular act of insolvency, the adjudication is not a judgment *in rem* as regards the commission of the particular act of insolvency and does not bind persons who were not parties to that order. 37 Times Law Reports 748, 10 Ch. D. 3, 12 Ch. D. 30 distinquished.

Under S. 116 (2) the order of adjudication is conclusive evidence only of the order having been duly made and *not* of the ground of the decision.

S. Duraisami Aiyar for Appellant.

N. S.

Beasley, J.
9th December, 1926.

O. P. No. 188 of 1926.

Companies Act, S. 38—"Omitted"—Meaning of—Share-holder removed by the resolution of directions—Remedy.

The word "omitted" in S. 38 of the Companies Act does not include "removed". Consequently the remedy of a share-holder removed by resolution of directors is not an application under S. 38 but a regular suit.

D. Ramaswami Aiyangar for Petitioner.

K. Aravamadu Aiyangar for Counter-Petitioner.

N. S.

Madhavan Nair, J.
9th December, 1926. } C. R. P. No. 1063 of 1925.

Civil Procedure Code, Sch. II, R. 1—Suit for dissolution of partnership—One of the defendants given up—Award passed without his concurrence in the reference to arbitration—Validity.

In a suit for dissolution of partnership between plaintiff and defendants 1—4 in the course of trial the 4th defendant was given up by the plaintiff. Later there was a reference to arbitration to three arbitrators without the 4th defendant being a party to the reference. The 4th defendant later appeared as a witness on one occasion before the arbitrators on behalf of one of the defendants. The arbitrators made an award defining the rights of the 4th defendant also. Objection was taken to the validity of the award,

Held, that Schedule II, Rule 1, Civil Procedure Code requires the concurrence of all the parties interested in a reference to arbitration and that the award passed in the absence of the 4th defendant was invalid as one made without jurisdiction. 48 M. L. J. 142, followed.

B. Somayya for Petitioner.

B. C. Sankaranarayana and *E. Krishnamurthi* for Respondents.

N. S.

Waller, J.
10th December, 1926. } C. C. C. A. Nos. 8 and 9 of 1925.

Madras City Municipal Act (1919), *Ss.* 287, 288 *and* 365 (2)—*Electricity Act and Tramways Act—Conflict between—Which prevails—Liability of Electric Supply Corporation and Electric Tramway Company to pay license fees.*

The Madras Electric Supply Corporation and Madras Electric Tramway Company who have got permission to carry on the works that may fall under Ss. 287 and 288 of the Madras City Municipal Act, under the Electricity Act and Tramways Act which are Imperial Acts are not bound to obtain licenses under Ss. 287 and 288 by paying license fees under S. 365 (2) of the Madras City Municipal Act, as the provisions of the latter Act being inconsistent with the provisions of the Imperial Acts referred to above cannot over-ride them. 34 B. 252 followed.

S. Rangasami Aiyangar for Appellant.

Nugent Grant for Respondent.

N. S.

[END OF VOLUME LI.]